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AT ITS

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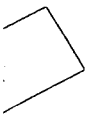

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American Political Science Association

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December 28-31, 1912

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[1] The Presidential Address of Professor Albert Bushnell Hart appears in the February, 1913 issue of *The American Political Science Review*. The address by Professor C. H. McIlwain on "The Tenure of English Judges," and that by Mr. Adam Shortt on "The Relation between the Legislative and Executive Branches of the Canadian Government," will appear in later issues of the same *Review*.

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CONSTITUTION OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION

ARTICLE I—NAME

This Association shall be known as the American Political Science Association.

ARTICLE II—OBJECT

The encouragement of the scientific study of Politics, Public Law, Administration and Diplomacy.

The Association as such will not assume a partisan position upon any question of practical politics, nor commit its members to any position thereupon.

ARTICLE III—MEMBERSHIP

Any person may become a member of this Association upon the payment of Three Dollars, and after the first year may continue such by paying an annual fee of Three Dollars. By a single payment of Fifty Dollars or of five payments of Ten Dollars each in successive years any person may become a life member, exempt from annual dues.

Each member will be entitled to a copy of all the publications of the Association issued during his or her membership.

ARTICLE IV—OFFICERS

The officers of this Association shall consist of a President, three Vice-Presidents, a Secretary and a Treasurer, who shall be elected annually, and of an Executive Council consisting ex-officio of the officers above mentioned and fifteen elected members, whose term of office shall be three years. These elected members shall be divided into three groups of five each, the term of membership of one of such groups expiring each year.

All officers shall be nominated by a Nomination Committee composed of five members appointed by the Executive Council, except that the officers for the first year shall be nominated by a committee of three to be appointed by the chairman of the meeting at which this Constitution is adopted.

All officers shall be elected by a majority vote of the members of the Association present at the meeting at which the elections are had.

ARTICLE V—DUTIES OF OFFICERS

The President of the Association shall preside at all meetings of the Association and of the Executive Council, and shall perform such other duties as the Executive

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Council may assign to him. In his absence his duties shall devolve successively upon the Vice-Presidents in the order of their election, upon the Secretary and the Treasurer.

The Secretary shall keep the records of the Association and perform such other duties as the Executive Council may assign to him.

The Treasurer shall receive and have the custody of the funds of the Association, subject to the rules of the Executive Council.

The Executive Council shall have charge of the general interests of the Association, shall call regular and special meetings of the Association, appropriate money, appoint Committees and their chairmen, with appropriate powers, and in general possess the governing power in the Association, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation or failure to elect, such appointees to hold office until the next annual election of officers.

Five members shall constitute a quorum of the Executive Council, and a majority of those in attendance shall control its decisions.

Ten members shall constitute a quorum of the Association and a majority vote of those members in attendance shall control its decisions.

ARTICLE VI—Resolutions

All resolutions to which an objection shall be made shall be referred to the Executive Council for its approval before submission to the vote of the Association.

ARTICLE VII—Amendments

Amendments to this Constitution shall be proposed by the Executive Council and adopted by a majority vote of the members present at any regular or special meeting of the Association.

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REPORT OF THE SECRETARY

of the

American Political Science Association

The ninth annual meeting of the Association was held at Boston and Cambridge, Massachusetts, December 27–31, 1912. The address of Prof. Albert Bushnell Hart, president of the Association, was entitled "A Government of Men," and appears in the *American Political Science Review* for February, 1913. The other papers read are published in volume IX of the *Proceedings*, which is issued as a *Supplement* to the *Review*.

The annual business meeting of the Association was held December 31, at which the following business was transacted.

The secretary reported a present membership of the Association of seventeen hundred.

The treasurer reported that the receipts for the current year had exceeded the expenditures by approximately $400, and that this had permitted the payment in full of an outstanding debt of the Association of this amount.

It was voted that the tenth annual meeting of the Association be held at Washington, D. C., beginning December 30, 1913; and that the eleventh annual meeting be held in Chicago, Illinois.

The last sentence of paragraph one of Article III of the Constitution of the Association was amended so as to read: "By a single payment of fifty dollars, or by five payments of ten dollars each made in successive years, any person may become a life member exempt from annual dues."

The following officers for the year 1913 were elected: President, Westel W. Willoughby; First Vice-President, Adam Shortt; Second Vice-President, F. A. Cleveland; Third Vice-President, C. E. Merriam; Secretary and Treasurer, W. F. Dodd. As members of the Executive Council to serve until December 31, 1915, the following were elected: J. I. Wyer, Jr., R. H. Whitten, J. W. Garner, C. A. Dunniway, J. A. C. Chandler.

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Prof. Ernst Freund and Judge Emlin McClain were elected members of the board of editors of the *Review*, *vice* Professors W. F. Dodd and Eugene Wambaugh resigned. Prof. W. W. Willoughby was continued as managing editor.

Upon the motion of Prof. McIlwain it was voted that the Association express its protest against continuing the duty upon books, other than fiction, imported into this country, and the president of the Association was instructed to present this protest, orally or in writing, before the proper committee of congress.

Mr. H. G. Wadlin was present, upon invitation, as a representative of the American Library Association. No formal action was taken by the Association with reference to its coöperation with the Library Association, but it was pointed out that the presence of Mr. Wyer upon its executive council is expected to lead to such coöperation as is possible.

The secretary reported to the Association the following minutes of of business transacted by the executive council and board of editors of the *Review* meeting, as usual, jointly.

At the meeting held at the University Club, Chicago, Illinois, November 16, 1912, the following were present: A. B. Hart, Adam Shortt, Ernst Freund, J. H. Latané, C. E. Merriam, J. A. Fairlie, Charles McCarthy, Isidor Loeb, C. H. McIlwain, T. H. Moran, J. Q. Dealey, Herbert Croly, W. F. Dodd, W. B. Munro, Jesse Reeves, P. S. Reinsch, B. F. Shambaugh, W. W. Willoughby.

The secretary-treasurer reported a total membership of the Association of approximately 1700, and that there would probably be at the end of the year a surplus of receipts above all expenditures sufficient to liquidate the present indebtedness of the Association, which amounts to four hundred dollars.

The president was authorized to appoint a committee to audit the accounts of the treasurer and report upon the same at the annual meeting of the Association in December in Boston.

The managing editor of the *Review* reported a proposal of the Waverly Press of Baltimore, Maryland, to do the printing of the *Review* at substantially the same cost as at present paid to the Rumford Press, and in connection therewith to give to the *Review* the advantage of an advertising department maintained by the Waverly Press. The managing editor was given authority to enter into this proposed contract with the Waverly Press.

The question of using a somewhat lighter weight paper but of equal bulk with that now used in the *Review* was discussed, and the managing

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editor authorized to make the change, should he deem it desirable. The general policy of the *Review*, and the value of its various departments were discussed. It was voted that the existing departments be continued and that in addition thereto provision be made, if possible, for current abstracts of important decisions of state courts relating to matters of public law.

The advisability of increasing the annual dues of the Association was discussed. It was voted that the matter be laid upon the table.

Prof. Munro reported with reference to the program of proceedings and local arrangements for the Boston meeting of the Association. The action was taken by the program and local arrangements committees was approved.

The committee on appointments reported that it had not completed the appointments of all the members of the committees authorized by the council at the December, 1911, meeting. It was continued, and directed to report further at the next meeting of the council.

Dr. Dodd, chairman of the general committee, reported that the organization of the committee had not been completed, but that some twenty members had been appointed. Thus far the committee had served only as an aid in securing material for the Department of News and Notes edited by Dr. Dodd for the *Review*. It was expected, however, Dr. Dodd reported, that the committee, when more fully organized, would be of great value to the Association in a number of ways, and especially in the matter of increasing the membership of the Association.

It was voted that a committee of five be appointed to consider the possible participation of the Association in the proposed social economy exhibit at the Panama-Pacific International Exposition in 1915 at San Francisco, California.

The possible coöperation of the Association with the American Library Association for the advancement of their common interest, and especially as outlined in the letter of April 27, 1912, of the secretary of the Library Association, was discussed, and it was voted that a representative of the Library Association be invited to attend the December meeting of the council for further discussion and determination of the matter.

It was voted that the secretary express to the State Library of New York the appreciation of the council of the great value of the *Index of State Statutes* and other publications previously issued by the Library, and to express the hope that it may be possible to resume their publication at an early date.

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The question as to the feasibility and desirability of closer relations between American colleges and universities to practical administrative problems was discussed, and Dr. McCarthy requested to draw up a plan for bringing this about and to send the same to members of the council and of the board of editors of the *Review*.

It was voted that, in the future, all ex-presidents of the Association, not members of the council or the of board of editors, be invited to attend all council meetings; and that the names of all ex-presidents appear in the published lists of officers.

The managing editor of the *Review* was instructed to prepare and report at the next meeting of the council a by-law regulating the mode of appointment and terms of office of the members of the board of editors of the *Review* and of the managing editor.

The president was directed to appoint a committee of five to make nominations for officers of the Association for the year 1913. The following were, therefore, appointed: J. A. Fairlie (chairman), Herbert Croly, Clyde L. King, W. J. Shepard, W. F. Willoughby.

The place of the annual meeting of the Association for 1913 was informally discussed.

At the meeting held December 28, 1912, in the Copley Plaza Hotel, Boston, Massachusetts, the following were present: Isidor Loeb, Adam Shortt, W. F. Dodd, Stephen Leacock, A. B. Hart, H. Croly, J. Q. Dealey, Eugene Wambaugh, B. F. Shambaugh, Jesse Reeves, W. B. Munro, Ernst Freund, J. A. Fairlie, Charles McCarthy, C. M. McIlwain, and W. W. Willoughby.

The chairman appointed Professors Loeb and Dodd to audit the accounts of the treasurer. The sum of $300, or so much of that amount as may be found necessary, was appropriated for clerical assistance to the secretary-treasurer. An appropriation of $250 was made for clerical assistance to the managing editor of the *Review*. The sum of $25 was appropriated for postage and other necessary expenses of the committee on political instruction in American schools and colleges.

It was voted that the fall meeting of the council be held on Saturday, November 15, 1913, in Chicago, Illinois.

The committees on city and county governments, on state governments, and the general committee reported progress and were continued for the year 1913. The chairman of the committee on state constitutions asked that a session of the next annual meeting of the Association be allotted to his committee, which was granted. A standing committee of three upon methods of legislation was created.

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Upon motion of Dr. McCarthy the following resolution was adopted with reference to laboratory work in political science. Resolved: That a committee of five be appointed; (1) to examine and make a list of places where laboratory work for graduate students in political science can be done; (2) to recommend to the various college and university faculties that due graduate credit be given to such places; (3) to use its best endeavors to obtain scholarships for this laboratory work, and to secure an endowment for the building up of a trained body of public servants; and (4) to make, if possible, a system of card records of efficiency standards for graduates doing practical laboratory work in political science. The sum of $25 was appropriated for the necessary expenses of this committee.

A written suggestion from Dr. L. S. Rowe, regarding the Second Pan-American Scientific Congress to be held in Washington, D. C., in October, 1914, was read, and the following resolution relating thereto was adopted: That the congress of the United States be earnestly requested to make a suitable provision for the holding of the congress at the time designated, and that a copy of the resolution be forwarded to the chairman of the committee on foreign affairs of the United States house of representatives, and the chairman of the committee on foreign relations of the United States senate.

The committee on appointments announced the following committee appointments:

Committee on teaching and study of government: Charles G. Haines (chairman), J. B. Davis, Edgar Dawson, Miss Mabel Hill, F. E. Horack, F. C. Jacoby, J. A. James.

Committee on city and county governments: J. A. Fairlie (chairman), F. D. Bramhall, O. C. Hormell.

Committee on state governments: H. J. Ford (chairman), J. Q. Dealey, A. N. Holcombe, G. W. Knight, F. V. Holman.

Committee on laboratory methods in political instruction: Charles McCarthy (chairman), B. F. Shambaugh, W. F. Willoughby, A. B. Hart, R. G. Gettell.

Committee on legislative methods: Ernst Freund (chairman), F. A. Updyke, J. A. Lapp,

Committee on appointments: Secretary of the Association (chairman, ex officio), W. B. Munro, F. J. Goodnow.

A by-law was adopted providing for the annual appointment by the council of the managing editor and members of the board of editors of the *Review*.

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REPORT OF THE TREASURER FOR THE YEAR 1912

RECEIPTS

Balance on hand, December 26, 1911	$22.14
Annual dues	3624.00
Life memberships	50.00
Subscriptions	282.00
Publications sold	415.00
	$4393.14

EXPENDITURES AGGREGATED

Legislative Notes for *Review*	$100.00
Clerical assistance to secretary and treasurer	430.95
Printing and distributing *Review* and *Proceedings*	2189.79
Council and board of editors meeting in Chicago	249.70
Purchases of back publications	57.10
Postage, expressage, etc., secretary and treasurer	296.00
Miscellaneous printing	187.00
Payment of loan and interest	420.00
Miscellaneous	51.76
Total expenditures	$3982.30
Balance on hand December 27, 1912	410.84
	$4393.14

Audited and found correct,
ISIDOR LOEB,
W. F. DODD.

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PAPERS AND DISCUSSIONS

HOW WE HAVE BEEN GETTING ALONG WITHOUT A BUDGET

BY FREDERICK A. CLEVELAND

Chairman, President's Commission on Economy and Efficiency

Nearly every writer on American government has commented adversely on the fact that appropriations are made by congress each year without a budget. Foreigners have frequently said that they are at a loss to know how we get along without a budget. One hundred and twenty-four years of experience of this kind should be significant. Would it not be well for us to answer the implied interrogatory, in our own minds at least, by considering how we have been getting along.

There are five very important purposes for which a budget is used in foreign countries:

1. A budget is used as a means whereby the executive branch of the government may get before the legislative branch and the country a clear-cut, understandable statement of past transactions, i. e., the budget carries with it an *account of official stewardship.*

2. As used in foreign countries, a budget provides a means whereby the executive branch of the government may get before the legislative branch and the country a complete and accurate *statement of present financial condition.*

3. A budget is used as an instrument for *planning future work*, i. e., as a basis for considering and determining what shall be undertaken during the next fiscal period.

4. A budget is used as an instrument for *financial planning*, i. e., it serves as the means whereby authorized expenditures may be amply provided for through authorities to raise revenues or to borrow money on the credit of the government.

5. One of the most important uses of a budget is that it provides the *means whereby the work of the legislative and the work of the executive branches may be brought into closer coöperation* to the end that the government may be made an efficient instrument for the promotion and protection of the public welfare.

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In attempting to answer the implied interrogatory as to how we have been getting along without a budget would it not be well for us to reflect on the experience of the United States in each of these important particulars.

MEANS DEVELOPED FOR GETTING BEFORE THE COUNTRY A STATEMENT OF OPERATION RESULTS

In our Constitution a clear-cut division is made between the powers, duties, and responsibilities of the legislative branch, and the powers, duties, and responsibilities of the executive branch. To the congress is given all powers which have to do with determining what shall be done, what organization shall be provided, what amounts may be expended. Responsibility for the efficiency and the economy with which the organization, the funds, and the equipment provided are used for doing the work authorized under the conditions prescribed is placed on the executive branch. And to the end that this responsibility may be definitely located, all executive power is "vested in the President" who alone of all persons in that branch is elected. Nor was the matter of responsibility for rendering an account of stewardship left to conjecture. This is not one of the "implied" duties. The Constitution is specific. It prescribes that "a regular statement and account of the receipts and expenditures of all public money shall be published from time to time;" and in order that the instruments for accounting might be at hand, the congress at its first session (1789) created an office and provided a salary for a comptrolling officer who might perform this function—such officer to be appointed by the President. Nor did congress leave the matter to conjecture as to what this officer should do; in this and in subsequent acts he was specifically charged with the duty to prescribe the forms and methods of "keeping and rendering" public accounts. It is evident that every necessary constitutional provision has been made and all the machinery has been in place, throughout the entire period of our national existence, for producing and making available complete and accurate information about what the government is doing. During this entire period of one hundred and twenty-four years, the doings of the government might have been recorded and reported in such manner that every school boy might have become familiar with its work.

It is pertinent to this inquiry to note what we have done under a system of legislative control over the government finances which does

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not take the President as the constitutional head of the administration into account—which does not hold that chief executive responsible for laying before congress and the country an account of executive accomplishments—a system which on the contrary asks each head of a department or establishment (the subordinates of the President) to report direct to congress.

Let us see what has happened. During all this time so little information has been produced and made available that the officers themselves have been seriously handicapped. The inquiries of congress have been regarded as hostile inquisitions. Under a régime of irresponsible committee rule, instead of developing a system of accounting and reporting that has kept pace with the growth of the government we find now that the government is almost entirely without information which reflects administrative results on even present financial condition. Instead of developing a means for locating and enforcing responsibility the administration has been broken up into small independent reporting units, the heads of which have gained a monopoly over such facts as are known about their own work. Instead of developing a means for making public the facts of public business, these heads have been asked to appear before irresponsible committees of congress personally to answer inquiries behind closed doors, and, when personally attacked, have relied on the absence of the records for their protection.

Without a budget which requires that the chief executive render an accounting which will force him as a means of protecting his own responsibility, without even a request to submit to congress each year a clear-cut, accurate account such as is contemplated in the Constitution, without calling into use the executive powers specifically granted by statute to prescribe the form of accounting and reporting, the facts of public business have remained undeveloped until every detail has been lost sight of in the mould and dust of the passing decades.

Another significant fact is this: The administrative officer on whom the duty of prescribing the forms of "keeping" and "*rendering*" accounts has been specifically imposed by statute has finally refused to recognize that he has any responsibility for developing any of the accounting and reporting processes which are needed for the purpose of developing facts about departmental management. Being a subordinate in a department which is primarily responsible for custodianship of cash, he has gradually narrowed the definition of his powers until after a hundred years he has conceived that the only meaning which is to be given to the statutory prescriptions referred to is that he shall take cognizance of the

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"account current" of the disbursing officer. In other words, it is definitely stated by this officer that although the statute says "all public accounts," he assumes no responsibility whatever for any of the records and reports *kept* and *rendered* other than those which are *kept* and *rendered* by persons to whom money has been advanced from the treasury.

The situation in which the chief executive finds himself was succinctly stated by President Taft in his special message of March 3, 1911. After calling attention specifically to certain gross inaccuracies, he said:

Without going into greater detail, the conditions under which legislators and administrators, both past and present, have been working may be summarized as follows: There have been no adequate means provided whereby either the President or his advisors may act with intelligence on current business before them; there has been no means for getting prompt, accurate, and correct information as to results obtained; estimates of departmental needs have not been the subject of thorough analysis and review before submission; budgets of receipts and disbursements have been prepared and presented for the consideration of congress in an unscientific and unsystematic manner; appropriation bills have been without uniformity or common principle governing them; there have been practically no accounts showing what the Government owns and only a partial representation of what it owes; appropriations have been overencumbered without the facts being known; officers of government have had no regular or systematic method of having brought to their attention the costs of governmental administration, operation, and maintenance, and therefore could not judge as to the economy or waste; there has been inadequate means whereby those who served with fidelity and efficiency might make a record of accomplishment and be distinguished from those who were inefficient and wasteful; functions and establishments have been duplicated, even multiplied, causing conflict and unnecessary expense; lack of full information has made intelligent direction impossible and coöperation between different branches of the service difficult.

The handicaps under which every officer labors may be concretely shown by the experience growing out of the recent effort of the President to get together what was thought to be the minimum of information needed to submit a budget. Among the requests for concrete data was one for a statement which would show the exact condition of appropriations as of June 30, 1911, and June 30, 1912.

The theory on which this request was formulated was that each act of appropriation carries with it the following specific authorizations:

1. An authority and duty to heads of departments to allot all general or lump fund appropriations.

2. An authority to heads of departments to incur liabilities.

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3. An authority to heads of departments to certify and approve vouchers for payment.

4. An authority to the treasury to advance money to disbursing officers under certain appropriations; or

An authority to the treasury to make direct settlements under certain other appropriations.

5. An authority to disbursing officers to draw checks and disburse public money in payment of claims which have been approved by heads of departments.

The need for having exact data with respect to each of these authorizations may be understood if it is said that officers are limited in their action to the amount of the appropriations, and furthermore, in most instances, it is a misdemeanor to exceed the authority granted.

Notwithstanding this very evident necessity for complete, accurate, and up-to-date information with respect to the condition of each of these authorizations, it was found that even after six months had elapsed few offices could comply with the request without incurring an expense which would be prohibitive—i. e., an exact statement of fact would require that a complete re-analysis of transactions be made affecting each appropriation. In a few of the accounting offices information was so kept that each of the balances asked for by the President might be ascertained; from others, however, little or no accurate information could be obtained. It further developed that, so far as was known, this was the first time in the history of the government that such a statement had been called for. Congress had never requested it; the executive had not called for it; the department of the the treasury had not thought it was desirable.

Under these circumstances and considering the great variety of methods employed in the hundreds of offices where such accounts were kept, an instruction was prepared, requesting that in so far as accurate information might be reported from the accounts, this should be sent in as a statement of fact; that in so far as accounts were not kept in such detail as to afford exact information, the balances should be estimated and returned as the best guess of the officer in charge. The reports received, partly statements of fact, partly made up of guesses, are the first returns that have ever been made, the aim of which has been to make a complete statement of the status of appropriations as of a particular date.

Further light may be thrown on the subject by reference to the returns of the departments of war and navy on cost of work. These are taken

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because they are the two large manufacturing departments of the government and the ones which for this reason have developed their cost accounts more fully than have the civil departments. Having in mind the desirability of showing separately the cost of each activity or class of activities in the war department, which was strictly military in character as distinguished from that which was strictly civil in character, the following analysis of expenditures was requested:

OUTLINE FOR ANALYSIS OF EXPENDITURES—WAR DEPARTMENT

I. *Military expenditures:*
   1. Departmental administration.
   2. The arsenal and other industrial establishments.
   3. The Army.
      a. Army administration and other general business.
         (1) General direction (general staff and general officers).
         (2) Inspection (inspector general).
         (3) Personnel and record work including recruiting.
         (4) Administration of discipline by courts-martial (judge advocate general).
         (5) Supply corps—providing structure, equipment, supplies, and non-personal services for the Army, handling and keeping of accounts for pay, food, clothing, quarters, transportation, etc.
      b. Direct cost of the Army proper (not including details to administrative offices or to militia, officers engaged in civil engineering and other civil work, or officers and men engaged on Alaska cable system).
         (1) At schools.
         (2) At prisons.
         (3) In garrison, field, and camp.
   4. The militia and other reserve forces.
      a. At schools.
      b. In field maneuvers.
      c. Other.
   5. Retired personnel.
   6. Pensioners.
   7. The dead (cemeteries, etc.).

II. *Civil expenditures:*
   1. Navigation—rivers and harbors, etc.
   2. Public buildings and grounds at Washington.
   3. District of Columbia engineering work.
      a. Washington acqueduct and filtration plant.
      b. Conduit Road.
      c. Reclamation of the Anacostia flats.
      d. Other.

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4. Washington and Alaska cable and telegraph system.
5. National and military parks and monuments (not within cemetery inclosures or in public buildings and grounds).

Upon submission of this request for information, however, the statement was made that it would be impossible within the three months available to prepare an accurate analysis of the kind—in fact, that it would be impossible to submit any result along these lines which would be accurate without a complete re-analysis of the accounts for the two years covered in the request. The representatives of the department who were assigned to the work were asked, therefore, to prepare the best information obtainable within the time and to submit estimates for such costs as could not be ascertained direct from the accounts. Even under this instruction the analysis prepared for the department as a whole was not received by the commission until about the middle of December, and was far from complete.

The difficulties to be overcome may be appreciated only as they are considered in some detail. In the first place there had never been an attempt made to prepare a statement which would show the cost of the military as distinct from the cost of the civil work of the department. The principal obstruction to obtaining such information lay in the fact that there has been no segregation of the pay, the subsistence, the travel, the clothing, the housing, and other costs related to the commissioned and the enlisted personnel who are detailed to the performance of duties that are civil in character, and this cost is a very considerable element to be reckoned with. The theory has been that the commissioned officers and enlisted men are a military cost to the government no matter what they are doing—in other words that their employment has risen from a policy of the government to maintain a military establishment, and that, in so far therefore as those military employees are used for civil purposes, their services are without cost except as they would be shown in the military group. But even this theory had not been consistently followed. Recognizing the desirability of getting a more accurate statement of cost of river and harbor work, several years ago a law was passed which provided that the salaries of all employees engaged solely on river and harbor work should be charged to river and harbor appropriations. This law has been interpreted to mean that when an officer is engaged only a small percentage of his time upon military work, such as sitting on a board or some other relatively small detail, this detail took him out of the class, and under the circumstances no part of his salary for the pay period

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could be charged against river and harbor appropriations. In theory, the smallest diversion of the attention of any officer within a pay period would cause his salary to be charged against a military appropriation, and since the military organization is necessarily a very mobile body, there is nothing gained by way of exact information through the enactment of a statute.

The same practice has been followed in relation to the detail of enlisted men. An illustration of this is found in the recent change in organization for the purpose of handling the business of the quartermaster's corps. Formerly civilian employees were used to a large extent as teamsters and in other manual employment. When so employed their pay was charged against the appropriation which corresponded to the particular work on which they were engaged—"transportation." As a result of change in policy many of these "teamsters" were supplanted by enlisted men, and their pay was no longer charged against the appropriation provided for the class of work performed, but was entered in the accounts as a part of the pay of the army. Under the recent law some 6000 enlisted men are authorized to be thus employed. These 6000 men may be utilized at the discretion of officers on work pertaining to transportation, clothing, subsistence, quarters, or any other of the subjects falling within the jurisdiction of the quartermaster general.

A still further complication is found in this: When enlisted men are employed in special lines of work which entitles them to extra or additional pay, this additional amount is charged to the appropriation for carrying on that particular line of work, but the regular pay is charged to the appropriation for pay of the army and is not considered as a part of the cost of the work to which the enlisted man is assigned.

Further illustration may be found of the difficulties which stood in the way of obtaining exact information about expenditures by classes of work in the department of the navy. The expenditures as classified in the returns fall under four main subdivisions, namely, (1) administration and other overhead, (2) the fleet, (3) yards and stations, and (4) marine corps. The form of report is such as to suggest that the "yard and station" expenditures represent costs of construction and repair. Further inquiry, however, develops the fact that the term "yards and stations" is intended to include various groups of activities which fall under the military discipline and control of the yard or station commandant. What is shown as the cost of the naval station at New York, includes the following activities which are not directly related

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to manufacturing divisions; a medical department and dispensary; two wireless stations; a medical supply depot; a naval hospital; a receiving ship on board of which is maintained a naval prison and an electrical school; ships in reserve; ships in ordinary; three naval magazines; and a purchasing pay office. On the other hand, the manufacturing enterprises conducted under the jurisdiction of the commandant include a shipyard, a clothing shop, and an organization plant for the construction and upkeep of officers' quarters, marine barracks, a sewage plant, and various other so-called public works. Under each of the yard commandants will be found various institutions and enterprises that are only indirectly connected with the operation of a ship yard, and at one station is included a civil government.

While the naval observatory and the hydrographic offices and recruiting offices are separately shown, the information which is not shown and which is not at present available except so far as they may be maintained as separate stations, includes the cost incident to the operation and maintenance, as well as the construction, relating to the following: 4 naval training stations, 31 coaling plants, 43 wireless stations, 12 naval magazines, 14 purchasing pay offices, 20 naval hospitals, 25 naval dispensaries, 15 naval schools, 7 naval medical schools, 3 naval medical supply depots, 3 marine corps schools, 13 naval target ranges, 1 marine corps target range, 48 marine posts and stations; besides these is the cost incurred in relation to 9 inspection districts, and inspections conducted in 16 different cites where material is made under contract.

A very complete system of job cost accounts has been installed at the yards. But no provision is made for the assembling of the "jobs" in such a way as to show what work relates to hospitals, magazines, prisons, or any of the other institutions and establishments which come under the jurisdiction of the yard commandent, except so far as these may be brought out by the classes of property shown by summary accounts which are called "titles." Title "G," for example, is the name of an account kept at each yard to show the cost of "Maintenance of yards and stations—industrial." For the purpose of providing a further analysis of this general or summary account, ledgers are kept from which is produced an analysis of title "G" or cost of "maintenance of yards and stations—industrial," under which will be found such items as the following: "grounds," "buildings," "water front," "furniture," "fire apparatus," "telephone and telegraph," "vehicles," and "live stock." There is no information available, and I am informed none to be had with respect to character or use of the grounds, buildings, furniture, fire apparatus,

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telephone and telegraph, vehicles, live stock, etc., which is here brought together by general classification. What is the cost which may be allocated to hospitals, wireless stations, prisons, magaines, marine barracks, or what not, there is no means for obtaining data even for making an estimate. In other words, the head of the bureau of medicine and surgery does not have provided any of the administrative data that is ordinarily furnished to the hospital board or to the executive head of an institution of this kind. The only facts which systematically and regularly come to the attention of the head of this branch of the service have to do either with the operating and physical statistics of each hospital or with the appropriations against which the officer must approve vouchers, and these vouchers constitute only a small part of the cost of running hospitals.

An illustration of the almost total lack of information which is necessary for considering the economy and efficiency of administration of civil departments is taken from the treasury—the department to which has been given the power and on which has been imposed the duty "to prescribe" the forms and methods of keeping all accounts and of rendering all reports in all of the departments of the government except the post office.

In this department there are some 18 different bureaus and offices, each of which is keeping accounts by a different method. One of these offices[1] is charged with the direction, operation, and maintenance of public buildings. It actually administers more than 700 public buildings located in more than 200 different cities and towns scattered over 49 states and territories. The accounts kept in this office do not separately show the cost of administration, operation, maintenance, and capital outlays; the administrative head of this office has no present means of obtaining complete, accurate, and prompt information about the heating costs, the lighting costs, the cleaning cost, or any of the other data which is absolutely necessary to intelligent direction and control. When such information was asked for it was necessary to make a special investigation, and even after weeks of delay, only a partial and inaccurate statement was obtained.

This illustration may be taken as typical of the many offices which make up the civil service of the government. There is only one large and widely scattered service in the government that has a complete system of records of expenditures and operation statistics such as is needed to administer the work economically and efficiently. This is the reclamation service—a subdivision of the department of the inte-

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rior which has acquired and now has under its control properties and plants that represent an investment of the government amounting to nearly eighty millions of dollars, set aside as a capital fund from the sales of public lands. Strange as it may seem this service is operated under a "lump sum" appropriation and has been almost entirely free from legislative control or statutory prescriptions having to do either with the subject of appropriations or accounts. In this, on the initiative of the administrative head, a scheme of information has been developed by means of which he may currently know about expenditures for each project in terms of exact standards for judgment. That is, he may know the mule-day cost of each corral; the man-day cost of each mess; the cement-yard cost of lining each tunnel; the rock-yard cost of each quarry, etc., etc. This development without doubt has been due to the fact that responsibilities for the exercise of discretion have been placed on the executive head of the bureau. To protect this responsibility under conditions which would lay him open to very harsh criticism in case the business for which he was responsible was inefficiently or wastefully managed, he evolved a scheme of accounting and reporting which would not only keep before him currently the facts, but would also enable him to give an exact account of the great capital fund with which he was entrusted. Without any formal requirement being laid upon him by statute or by executive order the instinct for management has here asserted itself and the records of that office stand out in the Department of the Interior like an oasis in a desert.

In the department of commerce and labor, the light house establishment is gradually developing a scheme of information that gives to the head of the service up-to-date results, which may be administered on, and after being acted upon administratively, may be reported to Congress. Here and there is to be found a legible hand in the mass of paper which is being sacredly stored away in vaults, but most of the facts, which might throw light on how one thousand million dollars of the people's money each year is spent, is like a pied galley in a printing office.

Not only has there been a failure to develop systematic accounting processes within the executive branch but congress itself has made no considerable demand for information about expenditures as a basis for considering what amounts shall be appropriated. The practice has been for congress to ask each service to report direct; and the form prescribed for the "book of estimates" does not provide for showing a complete or accurate statement of actual expenditure. What is insisted on by

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congress is a statement of amount appropriated for the last year and of amounts requested for the next year. In the compilations of the committees on appropriations, amounts estimated and amounts appropriated each year for a series of years are laid before members of the committee, but there is no provision made either for a statement which will show what amounts have actually been spent, what are the balances of past appropriations unallotted, the balances unencumbered, the balancesunexpended, what increments to appropriations have been received during the year as reimbursements, what amounts may be expected as reimbursements for the next succeeding year, what is the relation of expenditures for the government as a whole to the revenues of the government as a whole. In short, there is practically no information regularly required to be laid before congress which goes either into the question of the economy and efficiency with which funds are expended or into the question of present financial condition.

Another fact is of interest; each house has organized standing committees on expenditures which are authorized to go into the efficiency and economy of management of each executive department and establishment, but not a single member of one of these is a member of an appropriation committee and no provision has been made for bringing any of the information which is necessary to thinking about the business of the government before these committees in a systematic manner. Furthermore, such statutes as have been passed by congress containing precriptions as to the form in which information shall be reported have only added to the confusion which theretofore existed. These prescriptions are to be found in 90 different laws and carry with them require ments for some 300 different forms of statements, none of which are coördinated and many of them conflicting in nomenclature and classification. In short it may be said that during the last one hundred and twenty-four years of operation without a budget the whole subject of developing information about what the government has been doing, what results have been obtained, the economy and efficiency of management for a hundred and twenty-four years, has been in a hopeless state of neglect. There has been no intelligible accounting with respect to the operations of the great public trust with which our federal officers have been charged.

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MEANS DEVELOPED FOR SHOWING PRESENT FINANCIAL CONDITION

In this relation it may be said that the records and reports through which information is gained about financial conditions is in the same state of neglect as are the operation accounts. In so far as responsibility is fixed by law for the custody of cash and the issue and retirement of obligations commonly called "debt," accounts and reports have been elaborated beyond all reason. But such a statement as a business man or as the financial world is accustomed to seeing and using has never been produced. This defect was characterized by President Taft in the special message above referred to, as follows:

> Take the combined statement of the receipts and disbursements of the government for the fiscal year ended June 30, 1910—a report required by law and the only one purporting to give an analytical separation of the expenditures of the government. This shows that the expenditures for salaries for the year 1910 were 132 millions out of 950 millions. As a matter of fact, the expenditures for personal services during that year were more nearly 400 millions as we have just learned by the inquiry now in progress under the authority given me by the last congress.
>
> The only balance sheet provided to the administrator or to the legislator as a basis for judgment is one which leaves out of consideration all assets other than cash, and all liabilities other than warrants outstanding, a part of the trust liabilities and the public debt. In the liabilities no mention is made of about $70,000,000 special and trust funds so held. No mention is made of outstanding contracts and orders issued as encumbrances on appropriations; of invoices which have not been vouchered; of vouchers which have not been audited. It is, therefore, impossible for the administrator to have in mind the maturing obligations to meet which cash must be provided. There is no means for determining the relation of current surplus or deficit. No operation account is kept, and no statement of operation is rendered showing the expenses incurred—the actual cost of doing business—on the one side, and the revenues accrued, on the other. There are no records showing the cost of land, structure, equipment, or the balance of stores on hand available for future use; there is no information coming regularly to the administrative head of the government or his advisors advising them as to whether sinking-fund requirements have been met, or of the condition of trust funds or special funds.

One of the results of this lax method of stating conditions is to be found in the administration of the sinking fund. In his report for 1910 the secretary of the treasury comments as follows:

> I beg to call the attention of the congress to the matter of the sinking fund. The sinking-fund law has fallen into neglect. It should be

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revised to a point where it can be obeyed. It is impossible to carry out the law as it is, for the treasury department has not at present any funds with which to pay off its debt. Presumably, I should set aside 1 per cent of the debt; and congress has made a permanent appropriation for this purpose, but it does not furnish the money with which to carry it out; and the sinking-fund law has been not exactly a dead letter but a dead-and-alive letter for nearly forty years.

Although the law is mandatory that the secretary of the treasury shall set aside a certain amount each year to retire the war debt and although during most of the time the amount called for was available, partly by reason of a temporizing policy established under conditions which do not require publicity, partly due to the fact that the bonds of the government have become involved in our currency system, the adminstration has consistently ignored the law until a sinking fund deficit amounting to hundreds of millions of dollars had accumulated when the new secretary recognized the impossibility of covering the deficiency and asked to have the law repealed.

Whether this condition may or may not be connected with the absence of a budget the conclusion would seem to be warranted that, if the Chief Executive had been requested each year to lay before congress a statement of financial conditions and operating results, the powers and duties which by the Constitution and statute law are laid on the executive branch, so far as these relate to accounts and reports, would have been more fully developed. Instead of making such a request of the head of the administration, increasing pressure has been brought at the bottom. By calling on the President for the submission of an annual statement, this would necessarily cause the accounting and reporting processes to be developed for the reason that responsibility for recommendations which, necessarily goes with such submission, would require the President and heads of departments in self protection to have submitted to them complete, accurate, and prompt statements of fact and to have these brought before them regularly in order that any question which might lay them open to criticism might be taken up and disposed of before it was too late. These statements of fact first made available for the information of the executive would later be made available to congress as well to citizens who are interested in what the government is doing and how officers are discharging their responsibility.

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PROVISION MADE FOR PLANNING FUTURE WORK TO BE UNDERTAKEN

Whether or not an annual budget prepared by the executive and submitted to the legislature is necessary to the intelligent planning of future work or may assist materially in reaching a decision as to what work, begun in the past, shall be continued during the next fiscal period, certain it is that ours has been a government without a plan. Not only has there been no consciousness of a program on the part of officers (legislative or executive) and on the part of the people, but there has been no machinery developed which is adapted either to the development of or to the intelligent consideration of a definite program which may serve as a guide to legislation and to executive action. This conclusion is beyond question, whether it is approached from the viewpoint of the executive or from the viewpoint of congress.

From the viewpoint of the executive the only person or persons who can formulate and submit for consideration a plan or program for the government as a whole is the President and his advisors. Definite provision is made in the Constitution looking towards the executive formulation and submission to congress of a plan or a program in such form and at such time as the President "shall judge necessary and expedient." But the fact is that a careful perusal of the messages of Presidents from Washington to Taft fails to disclose such a submission in any form except in so far as, from time to time, isolated subject may be introduced for discussion.

It is almost unbelievable that within the last one hundred and twenty-four years not a single undertaking of the government has been the result of the consideration of a comprehensive plan of government work: The government has never had a consistent, well-considered military program; it has never had a recognize naval program; it has never had a well thought out and consistent plan for the protection and promotion of American interests abroad; it has no plan or program with respect to the regulation of commerce and immigration that is consistent even with itself; it has had no plan or program for the promotion of the interests of the laboring classes; even in such broad subjects as transportation there has not been an attempt to formulate a national plan since the days of Jefferson when he asked Albert Galatin to report a scheme for internal improvements which would be national in scope—a plan which by the way after having been worked out was never adopted; we have never had a program looking toward the protection and promotion of public health or for assisting in the development of a consist-

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ent plan of public education. Pension laws have been passed, the fulfilment of which necessitates the expenditure of greater sums than the direct cost of all of the wars in which the country has been involved without an actuarial calculation or even the consideration of how a particular act may affect the treasury. One governmental activity after another has been developed, growing out of the interests of particular individuals in subjects of welfare or the ability of others to get individual proposals before Congress in a commanding manner. The result has been that the only organization of the executive branch that has consistently built up around a particular kind of work to be done is the postal service. We have two navies—one in the treasury, the other operated by the department of the navy. About one-third of the expenses of the war department are civil in character. The one department of public service other than postal that has been most consistent in the development of its activities is the Department of Agriculture, but here we find years of conflict and scandal growing out of the establishment of two large and important health services in a group to which they did not properly belong.

Going to the legislative side we find that the legislator has had little regard for the development of a government program or policy, as is clearly evidenced by the organization of its own committees. The committees of congress follow neither organization lines nor functional lines. The war department, for example, in obtaining its regular appropriations, must deal with seven different committees and subcommittees which have charge of as many annual appropriation bills, besides the various other committees in which originate bills that carry permanent appropriations. Furthermore, thare is not a broad subject of government work which comes before one committee. The enterprises of the government which have to do with the providing of transportation facilities, for example, go piecemeal before seven regular committees and are appropriated for in eight different annual bills, besides the committees and bills that provide for permanent and continuous appropriations to the extent of $2,000,000 a year. Questions of public health must be considered annually by four different committees whose conclusions are expressed in as many bills, outside of the health functions for which permanent appropriations are made, and those which go before committees dealing with military and naval affairs.

Whatever may be said about the utility of a budget as an instrument of planning, the fact stares us in the face that during the last one hundred twenty-four years we have not developed any means for considering

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a plan or program for governmental activities, whether for the the federal government as such, or for the federal government in coöperation with States and municipalities.

MEANS DEVELOPED FOR PROVIDING ADEQUATE FUNDS

While the power "to lay and collect taxes, duties, imposts, and excises" has been given to congress, as well as the power "to borrow money on the credit of the United States" (and a corresponding limitation has been placed on the executive branch, which makes it unlawful to disburse any of the public moneys, "but in consequence of appropriations made by law") congress can have no basis for judgement with respect to these matters except as it obtains information from the executive branch. In recognition of this fact the following provision was contained in the act creating the Department of the Treasury:[1]

> It shall be the duty of the secretary of the treasury . . . . . to prepare and report estimates of the public revenue and the public expenditures.

Later this duty was made more specific by an act approved May 10, 1800, as follows:

> It shall be the duty of the secretary of the treasury to digest and prepare and to lay before congress at the commencement of every session a report on the subject of finance, containing estimates of the public revenue and public expenditures, and plans for improving and increasing the revenues, from time to time, for the purpose of giving information to congress, and adopting modes of raising money requisite to meet public expenditures.

Initially the congress was also organized in such manner that all questions of appropriation and money raising came within the jurisdiction of a single committee. Whether or not the fact that the government has been doing business without the budget may be considered as a reason, the fact is that this original idea has been entirely departed from. At the present time one committee considers the question of raising revenue. Fourteen other committees and sub-committees have charge of appropriation bills. Not only has there come to be an utter lack of coördination in organization for the consideration of the question as to whether the appropriation requested come within the prospective of the government to meet them, but responsibility for a deficit

[1] The office of the supervising architect.

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seems to have been shifted by congress from its own shoulders to the executive. That is, the theory seems to have been that the revenues always will be sufficient no matter what amount may be appropriated. In case, however, it may happen that the cash in the treasury at any time prove to be inadequate, the President is made responsible for issuing bonds to cover the deficit and to keep up the cash reserves required for the protection of the national currency. This carries with it no element of forethought; it only provides a means whereby the government may be protected against default on its obligations after deficit occurs.

MEANS PROVIDED FOR COÖRDINATING LEGISLATIVE AND EXECUTIVE ACTIONS

One of the most important uses which a budget serves those countries in which it has been made a part of the regular machinery of doing business is this: That it provides a means whereby the legislative and the executive branches may be brought into close coöperation; it places each branch on a plane of openhanded, fair dealing instead of putting the one branch in the attitude of seeking to circumvent or frustrate the plans and purposes of the other.

In those countries the principle is invoked that the executive as the head of the administration should be responsible for submitting requests for appropriations and for making recommendations for changes that are thought to be necessary or expedient. By this means the chief executive or some one who may be delegated to represent his views is placed in the position of an advocate and as such is bound to support his proposals with statements of facts sufficient to enable individual members of the legislature, as well as the public, to judge whether the request is one that should be granted. By placing responsibility for executive proposals on the chief executive, in so far as there may be differences of opinion developed, these differences have to do with definite concrete issues that may be understood and discussed as a part of a general welfare program. In other words, the whole issue is shifted from such considerations as whether the janitor of an office building located on "F" street shall receive an increase of $100 a year in salary or whether there shall be two clerks or three clerks appropriated for in a particular office, to questions of supreme importance to the country.

In the development of the American practice, although the President has had through all these years full powers to submit a budget, he has

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never done so; he has never assumed any responsibility for appropriation requests except those which may be specially mentioned in a message and then he is put in the attitude of a special pleader.

In this respect the President has to this time failed to take the part of a chief executive—a part which is clearly indicated in the Constitution. On the other hand congress as a great representative body, whose hundreds of individual members are necessarily unfamiliar with the details of current business transacted, has attempted to prescribe the minutest details; they prescribe how many clerks and what salaries shall be paid in a particular office; they prescribe just how the requests for appropriations that are to be administered by the executive branch shall be prepared and submitted, and in doing so have completely ignored the chief executive as the responsible head of this branch; instead of making requests on the head of the administration for such information as they may deem desirable, they have brought increasing pressure on subordinates at the bottom; instead of requiring that complete and accurate statements of fact be submitted each year (as seems to have been contemplated by the Constitution, in any event as would be required by a board of a great private corporation), the whole matter has been left in the hands of committees on appropriations to develop; instead of requiring information in such form that it would be available to members of congress and to the public, each of the many officers who are in touch with the technical details of the great complex business of the government are called in and interrogated as witnesses; only a partial record of this testimony is kept, i.e., such as the committee may deem worth while printing, in the form of hearings and this is not made available for general publicity.

Thus, each year a star chamber trial of the administration is conducted which does not even afford the opportunity to the head of the administration to state his case. A secret meeting is held with his subordinates, each of whom can have no means of seeing the problem of the administration except from the narrow angle of his own work. This not only puts the administration at a disadvantage in making plans for the discharge of executive responsibilities; not only makes impossible all forethought directed toward increasing the efficiency with which public service may be rendered and the economy with which public revenues may be expended, but it puts congress to a still greater disadvantage. Even though the concept as to what congress should do be narrowed down to the function of investigating the administration, the members of committees who are charged with conducting such inves-

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tigations are like lawyers going to trial without the preparation of a brief. When the case of the administration is called, a subordinate officer of the defendant appears as the only person in court who has any considerable knowledge of the subject; the witness for the defense is the only one ready for trial. Under such circumstances whatever may be the shortcomings of the administration, it is a matter of fortunate chance if these shortcomings are developed at the hearing.

The logical outcome of such a system as this is increasing friction; increasing hostility; increasing jealousy between the two branches of the government which must determine and execute plans for public service. One hundred twenty-four years of experience can leave no doubt that the logic of such a system has been fully realized in practice. Such a system has stood in the way of developing and utilizing expertness in the handling of the many highly complex and technical activities of the public service. Under such circumstances there has been an over-increasing conflict of interest between the two branches, that has gone far toward depriving the government of the benefits of the exercise of executive discretion on the one hand without providing any means for the exercise of a form of legislative control which makes for economy and efficiency in operation on the other. The form of legislative control over the administration that has been developed is of the same character as that which has been developed by the courts for the control of the criminal classes, viz., control by restraint.

Thus we find that the business of the government of the United States is conducted by two sets of officers who are pitted against each other, instead of coöperating for common ends. Congress has been made to know that the attitude of the administration is one of deception; the administration has been made to know that the attitude of congress is one of increasing restriction; each has become increasingly suspicious of the other. On the one side there has been an increasing disposition to withhold information; on the other side action has been taken to limit authority and opportunity.

CONCLUSION

In conclusion this may be said; That one hundred twenty-four years of operation without a budget has not developed a means for requiring the executive branch to submit an annual account of stewardship; that we have not developed a means for getting before the legislature and the country an accurate statement of financial condition; that we have

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not developed a consistent, well-considered plan as a guide for the enlargement and adaptation of government activities; that we have not provided a means for coördinating government revenues with government expenditures; that we have not evolved a method whereby the work of the legislative branch may be correlated with the work of the executive branch to the end that the government may be made an efficient instrument of public service. In the development of governmental activities our experience has been novel but disappointing. The demand for increasing efficiency as well as the demand for greater economy has come as a result of public unrest, due to the recognition of the unfavorable contrast in which our government stands when compared with other governments which have made use of a budget as a means for getting before the country information as to what has been done and what is proposed each year as a basis for financing. In the United States the people are each year asked to take a thousand million dollars of stock in a public enterprise, the sponsors of which have been in the attitude of refusing to tell what the money will be spent for and how last year's contributions were used. The subscribers are not demanding that the officers of the corporation shall submit a report and prospectus before asking for further contributions. The public are asking the officers of the government for a statement of affairs and a statement of proposals for the future which will entitle them to the confidence and support of thinking men and women. We have drifted away from the theory that the primary end which the government serves is to further partisan and personal interests. We are gradually disassociating politics from forms of cunning which have so long been employed for public spoliation. Government is no longer accepted as a "confidence game" to be played on an innocent public that is required to take stock but is kept in the dark about what is done with their contributions. The public has gradually lost interest in government as a means to private advantage or for the benefit of a preferred class or "organization." The public resents this attitude on the part of officers and on the part of politicians who regard positions of trust as a business or social opportunity. Government has come to be regarded as serious and important business.

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THE LIMIT OF BUDGETARY CONTROL

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The limit of budgetary control becomes a legal question only where the attempt is made by a written constitution or a statute to distinguish between powers of a policy determining character which are vested in a budget making authority and powers of a policy executing character which are vested in an authority possessed of executive or administrative functions only. The questions to which a discussion of the reciprocal relations of such independent authorities may give rise are in the case of the national congress and of a state legislature, constitutional and therefore legal in character. Nevertheless they are not of a justiciable nature, since neither the congress nor the state legislature is subject from this point of view to the control of the courts (see United States vs. Gratiot, 4 How. 81, where it is said: "A specific appropriation could not be diverted from its object"). The national congress or a state legislature may, therefore, in the absence of specific constitutional limitations grant to the administrative authorities, to which is entrusted the expenditure of public moneys, very great discretion in such expenditure, both from the viewpoint of the period of time during which the expenditure may without further authorization continue to be made and from that of its purpose or of the object for which it may be made. Or on the other hand, the budget making authority may prescribe the period of availability of each appropriation, or the specific purpose or object of expenditure in such detail as to make the function of administration a merely ministerial one. Thus either the general law or an appropriation act may provide that the sums granted shall be available for a single year or that the expenditure of such sums shall be made at a uniform rate during the period of availability. Thus again either the general law or the appropriation act or the two together may fix both the amount which may be expended for specific objects of expenditure and the character or number of such objects. This is quite common practice in the case of the appropriation act of congress for the expenses of the departmental services at Washington. This act states

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in great detail the salaries which may be paid to different classes of clerks and the number of clerks in each class.

Where the attempt is made on the part of a budget making authority to descend into great detail in its appropriation acts the spirit if not the letter of constitutional or legal provisions which attempt to distinguish legislative from executive power is really violated. For the executive authority is shorn of discretion in the exercise of its powers and is reduced to a position of complete dependence upon legislative caprice. No better example of the complete destruction of executive independence accomplished in such a manner can be adduced than the position to which the governor was finally reduced in the former colony of New York where the assembly persisted in appropriating their salaries to colonial employees by name. Through following this practice the colonial assembly practically assumed to itself the power, which it did not theoretically possess, to appoint the employees of the colonial government.

In the case of cities and other local bodies, however, the law may expressly grant to an administrative authority the complete control and management of a specific branch of administration while reserving to a budget making authority the right to determine the amount of money which such administrative authority may spend. In such case if the budget making authority attempts to specify the amounts that may be expended for particular activities or for specific objects of expenditure by the administrative authority having the control and management of a given branch of administration, a question justiciable by the courts may arise in case the administrative authority having by law the control and management of the branch of administration fails to observe the limitations imposed upon its powers of control and management as a result of the segregation of appropriation items.

It is remarkable, however, that there are few if any cases deciding what is the power of control which a budget making authority possesses over the exercise of the powers of control and management which may have been granted to some other authority of the government.

The almost complete absence of decided cases with regard to the power of budget making authorities is explainable on one of three hypotheses:

1. Budget making authorities have not attempted through the exercise of their powers to control the discretion of administrative authorities granted to them clearly by law, or

2. Administrative authorities have violated with impunity the restrictions which budget making authorities have attempted to impose upon the exercise of such discretion, or

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3. A *modus vivendi* has been reached which has been observed by both classes of authorities.

But whatever may be the correct hypothesis the question is neither interesting nor important except to the student of administrative law. The important question is, assuming that budget making authorities are practically omnipotent from the viewpoint of legal authority, what should in the interest of good administration be the limits within which they shall actually confine their action?

An examination of appropriations which are commonly made by budget making authorities will show that the ordinary limits imposed upon the expenditure of public funds affect (1) the period of authorization; (2) the character of the activity; and (3) the object of expenditure.

1. The period of authorization. An appropriation which is not limited as to the period of its authorization is usually spoken of as a permanent appropriation. That is it authorizes the expenditure of money under it until the budget making authority repeals it. No positive action is necessary to continue it in force during succeeding budgetary periods. An appropriation may without being permanent be made by the budget making authority available during a period longer than the ordinary budgetary period. If that is a year the period prescribed may thus be two, three, four or any specified number of years.

Usually the purpose of prolonging the period of authorization beyond the usual budgetary period is to provide a greater stability for the governmental activity for which the appropriation is made. This is done either with the idea of strengthening the confidence of private individuals dealing with the government or of permitting the administrative authority having control of the appropriation to make comprehensive and continuing plans. It is for this reason that the interest on the public debt is usually provided for by a permanent appropriation. It is also for this reason that the expenses of an administrative service whose existence and operation are deemed vital to the very existence of the nation are sometimes provided for by permanent or quasi-permanent appropriations. Thus in Germany the expenditures for the army are provided for by appropriations which continue without interruption for seven year periods although the ordinary appropriations are made for annual periods. Thus again in some of the states expenses for either general or particular educational purposes are based on permanent law which in some cases leaves the amount of the appropriation indefinite in that provision is made merely for a certain rate of tax to be imposed on a varying assessment valuation.

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What activities should be provided for by permanent or quasi-permanent appropriations is naturally dependent upon the peculiar conditions of the particular country, state or city. It is always, however, to be remembered that the more permanent the appropriation the more removed from current legislative control is the branch of administration which has such an appropriation. Furthermore the greater the number of such services, the greater will be the difficulty in securing uniform treatment of similar administrative problems inasmuch as the absence of uniformity in control is apt to bring about diversity in practice. A common result of such appropriations is inefficiency and extravagance if the appropriation is in excess of the needs of the service concerned or inadequate provision for the progressive development of the service if the appropriation is insufficient in amount. The reasons for according such a position of independence to an administrative activity must therefore be cogent.

2. *The character of activity.* Most governmental services are entrusted with the performance of several more or less defined activities. Thus a school board may carry on primary schools, kindergartens, grammar schools, high schools, trade schools, normal schools, etc. Instruction may be given in special lines, such as music, drawing, manual training, etc., which may require the services of special instructors. In such cases a city budget making authority may grant to a school board a lump sum for the entire service of the schools, or it may appropriate the money granted in such a manner as to segregate the items of appropriation for the particular activities attended to by the school board. Whether it shall do the one thing or the other depends of course upon the answer to the question whether it is better to entrust the expenditure of school moneys to a special authority having peculiar knowledge of the needs of the schools and little if any knowledge of the financial resources of the city or to give to the latter authority, because it has knowledge of the city's financial resources the right to determine in more or less detail the purposes for which school moneys may be spent although it cannot in the nature of the things have much detailed knowledge of school needs. Generally the answer of the American people to this question has been in favor of the administrative authority; i. e., the school board rather than in that of the budget making authority, i. e., the city council. This answer has been, however, due to other reasons than the desire to fix proper limits to budgetary control. Our municipal administration generally has been so honeycombed with partisan politics that a large independence has been given to school administration

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in the hope of freeing it from the pernicious effects of partisan political considerations. If, however, such influences were eliminated from our city governments, it might well be that city school administration in this country would be treated as one of several well recognized branches of city administration.

Even at the present time it is sometimes provided by law that city school boards which possess large discretion in the expenditure of moneys appropriated shall submit to the budget making authority detailed estimates for school needs. This would seem to be the principle whose application is desirable whatever may be the powers possessed by the budget making authority in the matter of segregating items of appropriation. For it is only as a result of a consideration of the detailed estimates of an administrative department that a budget making authority can reach an intelligent judgment as to the total amount which should be spent for the activities under the control of such department. The demands for municipal expenditure at the present time have become so numerous and so insistent that it is difficult for a city budget making authority to determine without detailed estimates for detailed lines of work what sum shall be expended for any general activity. In our present stage of municipal financing a budget making authority cannot thus compare the school budget as a whole with that of the health department as a whole. It must choose, for example, between the extension of high schools on the one hand and that of contagious diseases hospitals on the other. What is true of a city budget making authority is just as true of congress or a State legislature. Intelligent budget making must be based on detailed estimates, so classified as to show the amounts estimated for specific activities.

It may therefore be said that a budget making authority may properly extend its control of appropriations to the point of defining with a considerable degree of particularity the activities for which public moneys shall be expended and the amounts of money which shall be expended for the particular activities defined, unless there are peculiar reasons, as have been believed to exist in the case of schools, for according to administrative authorities a large degree of independence. If the exact specification of the amounts assigned for the carrying on of kindred activities by a practically uni-functional administrative authority such as a school board deprives such an authority of so much discretion as to be productive of administrative inefficiency it is an easy matter to append to the specific appropriations the permission, accorded ordinarily by the United States agricultural appropriation act, within the general limits

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of the appropriation to vary the particular items of appropriation by adding to one such item and deducting from another such item a specified percentage such as ten per cent.

3. The objects of expenditure. Appropriation acts very commonly endeavor to limit the availability of appropriations by providing that no more than certain sums, or exactly certain sums, shall be expended for particular objects. This limitation is perhaps most commonly made with regard to salaries and wages. It is also often found in the shape of a maximum in the case of the purchase of real estate. It may perhaps be justified in this latter class of expenditure because of the large amounts which the purchase of real estate frequently involves. It is doubtful, however, if it is justified in the case of most other objects of expenditure. It is more than doubtful whether it is ever justified in any such case except where it is imposed as a limitation of the maximum expenditure which may be incurred. For the absolute fixing in an appropriation act for example of the exact number of employees in each salary grade takes from the administrative officer the opportunity to make a record for himself. If all his lower salary grades are full he may be obliged by such detailed appropriations to make an appointment to one of the higher salary grades which may be vacant, although he may be convinced that one of the lower grade salaries is sufficient compensation for the work which is to be provided for.

This much can be said, even though it may be admitted that it is desirable that salary schedules provided by general law shall be so fixed and the discretion of administrative officers so limited that work of the same grade in all lines of activity shall be paid at the same rate. For an appropriating body is not the proper authority to determine the salaries which shall be appended to particular positions. It should have and exercise the right to determine the lump sum to be expended for salaries and wages necessary for a particular line of work. This power it must exercise in order that its financial control may be effective. But it is not possible in the hurry which usually attends the passage of appropriations for the body in charge of them to give sufficient time or thought to the determination of the question what salaries are proper for particular classes of work.

An appropriating body should therefore in no case fix beyond the possibility of change by an administrative officer the exact number of the employees of the particular grades. It should content itself with determining the maximum amount to be expended for salaries and wages for a particular work and grant to the administrative officer the

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right so to distribute the amount as he sees fit subject to the limitations contained in the general law as to the compensation to be paid for particular grades of work. Only where such a method has been adopted is the highest possible degree of administrative efficiency attainable.

What has been said with regard to salaries and wages may be repeated with regard to most other objects of expenditure. The budget making authority should, if it feels that it should exercise any control over this class of expenditure, content itself with fixing the maximum sums which may be spent for each class of objects. It is only through the adoption of such a method of appropriation that what is sometimes spoken of as a cost data budget may be developed. By this is meant a budget which bases its appropriations on the theory that there is a certain amount of work of a specific kind to be done and frames these appropriations in such a manner that wide freedom in their expenditure is accorded to administrative officers who are, however, obliged to render a detailed account of their actions.

It may perhaps be desirable that expenditures which are to be made in particular localities such as expenditures made from a general budget for local public improvements such as buildings or streets or other things of this general character should be treated somewhat differently. Here the needs of a reasonably symmetrical local development may make it necessary to limit the discretion of administrative officers as to the choice of the localities in which public funds shall be expended. This is particularly true of the expenditures of the national and state governments but may be applicable as well to those of cities of large size. But even in these cases the limitation in great particularity of the locality of expenditures may be and often is accompanied by such abuses, such as extravagance and local favoritism, as to overcome any advantages by which it may appear to be accompanied. In these cases it would be far better to adopt by permanent law a comprehensive plan and to appropriate to the administration for the carrying out of this plan lump sums, subject to a limitation such as is again to be found in the United States agricultural appropriation, that no more than a certain percentage shall be spent in any one local district. By such a method log rolling would be largely eliminated, expenditures would be more efficiently made, particularly if the permanent or quasi-permanent appropriation idea were combined with it. For in this way comprehensive plans for future work could be formulated which would provide sufficiently for local needs.

What has so far been said as to the proper limit of budgetary control

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has been said from the point of view of administrative efficiency. There is, however, another point of view from which the subject may properly be considered. This is that of legislative control. For while it is desirable that the administration shall be efficient, it is equally desirable that it shall be subject to popular control. This control can in the nature of things be exercised only by a body like the legislative body, representative of the particular local districts which together form the entire country, and therefore representative as well of the entire country. Under a system of government which like the American system lays great emphasis upon the separation of legislative and executive authority it is, however, extremely difficult for an effective legislative control over executive action to develop. For the only direct personal control which the legislative body may constitutionally exercise over the executive is to be found in its power to impeach executive officers. This method is, because of its cumbersomeness and its slowness, inapplicable for the purposes of an effective current legislative control.

The only means under our system of government that is really available to the legislature to influence and control effectively executive action, is to be found in its power through appropriation acts to limit the executive's freedom of action. For through these acts the legislature may, if it sees fit, control the extent and methods of executive activity by determining both the purposes for which money may be spent and the amounts which are available. This is therefore the method to which resort has been had very commonly in this country. In its desire to exercise an effective control over executive action, the legislature has, however, often failed to consider the loss of efficiency to which the resort to this method of control inevitably leads. For appropriations have frequently become so specific and detailed in character as to deprive administrative officers of that degree of discretion which is necessary for efficient administration.

The question, therefore, presents itself how may the demands for an effective legislative control over executive action be satisfied without sacrificing administrative efficiency? It may be assumed that this control will be based on the power to make appropriations. For, as has been said, it is only through the exercise of this power that a legislative control over the action of an executive otherwise constitutionally independent of the legislature can be developed. It is believed that the demands of legislative control and of administrative efficiency will be reconciled if provision is made for the rendering to the budget making authority by administrative authorities of such detailed, comprehensive,

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intelligible accounts of expenditures and of work done as will permit the budget making authority to reach an intelligent judgment both as to efficiency of administration and as to conformity by the administrative authorities to the expressed will of the budget making authority. If such accounts were presented at the same time as the estimates of expenditures for the future, and if such accounts and such estimates were classified and arranged along the same lines both in their summaries and in their details, it is believed that the budget making authority could easily determine whether the administration had been efficient and whether it had in its actions carried out the legislative mandate. On the basis of such expenditure accounts and such estimates and on this basis alone may a cost data budget such as has been mentioned be developed.

Suppose now that after considering such reports and such estimates the budget making authority were not convinced that its mandates had been heeded or that the administration had been efficient, the question will naturally be asked what can the budget making authority do? There are practically only two things. These are, first, it may specify items of future appropriations in great detail with the result of so diminishing administrative discretion as to impair administrative efficiency. This is what has been done in the past. Or, second, it may express its disapproval of the administration by cutting down or refusing altogether appropriations for those services which in its opinion have been unsatisfactorily managed, and by continuing in this course until those persons in charge of administrative services who have been found wanting have severed their connection with the government.

It is of course, true that the adoption of the second alternative by the budget making authority would constitute a serious inroad upon the principle of the separation of executive and legislative power. At the same time it can hardly be denied that some such arrangement is the only one which gives promise of permitting administrative authorities to exercise a degree of discretion sufficient to insure the most efficient action and of securing the exercise by the legislature of an effective control over the executive without which real popular government can with difficulty be maintained. It would naturally be difficult to apply such a method of control to administrative authorities owing their positions to popular election rather than to executive appointment. But the abandonment of the elective idea is coming more and more to be admitted as necessary both from the point of view of popular control and from that of concentrating executive responsibility and increasing administrative efficiency. The success of the "short ballot" movement

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on the one hand and the increased concentration of city government through, e. g., the adoption of the commission form on the other, are both evidence of the rapidity with which formerly almost universally accepted ideas as to political organization are being abandoned. Is it too much to hope that similar considerations will lead us to give up our adherence to the principle of the separation of powers, as it has been understood and applied in the past? It would seem that as a result of its application we have already suffered sufficiently both in the ease of our constitutional development and in the efficiency of our administration. The air is now ringing with the demands of the people, both for a better adaptation of our political system to present day needs and for an organization which may efficiently discharge the vastly increased tasks which must be assumed by the government. It is certainly not improper to insist that we shall emancipate ourselves from the dictates of a theory which, whatever may have been the reasons for its adoption, has ceased to be applicable to modern conditions, and that we shall attempt to solve our problems in view of the facts of life as they now present themselves to us.

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ALLOTMENT OF FUNDS BY EXECUTIVE OFFICIALS, AN ESSENTIAL FEATURE OF ANY CORRECT BUDGETARY SYSTEM

BY W. F. WILLOUGHBY

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That congress is to be the body that should finally determine the amount of money to be available each year for the support of the various branches of government no one questions. In exercising this function, however, congress has open to it a wide range of discretion. It can do as the British parliament did for centuries after it had taken to itself the power of the purse, vote a lump sum, or, what was the same thing, the total product of certain taxes, for the support of the government, leaving it to the executive—the crown—to apply this sum to the various objects of government as its discretion dictated. Or it can do, as parliament now does, specify in general terms the manner in which this total shall be distributed among the several branches of government, leaving to the executive the authority to allot these sums more specifically. Or, finally, it can do, as congress now in great part does, attempt to set forth in the greatest practicable detail the precise manner in which the sums voted shall be applied.

This latter method means that congress seeks by law to give precise and detailed instructions to the executive as to exactly how the money appropriated shall be spent, just what stations, bureaus, and offices shall be maintained, how much money shall be spent for the remuneration of personnel, the number of persons that shall be employed, the compensation that shall be paid to each, the character of the work that shall be undertaken, and the expenditure that shall be made for each item, the amount of money that shall be spent for this or that kind of supplies, materials, etc. This method ignores, as far as it can, the fact that the efficient conduct of affairs necessarily involves the exercise of discretion from day to day by those actually in charge of the work to be performed, that it is impossible to estimate in detail the precise sum that will be required for each subdivision of a work, that contingencies impossible to foresee will constantly arise making it desirable that decisions as first taken should be radically changed.

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It is not contended that congress, in all cases, carries its particularization of the manner in which money appropriated for the support of the government shall be expended to the extent above suggested. Anyone familiar with administrative affairs at Washington, or the contents of the general appropriation acts, can easily point out numerous cases where congress has made its appropriations for certain services or certain categories of work in the form of so-called "lump-sum" appropriations. The best example that the writer knows of such an appropriation is that made for the taking of the thirteenth census and the support of the bureau of the census during the three-year census period. In effect congress voted in three installments, in as many appropriation acts, covering this period, a lump-sum of fourteen or fifteen million dollars for the taking of this census and the carrying on of other lines of work in charge of the bureau of the census. Although certain limitations were imposed upon the bureau in respect to the number of persons who might be employed at certain salaries, the expenditure of this large sum was practically left to the discretion of the director of the census, and his official superior, the secretary of commerce and labor.

The existence of appropriations of this character does not, however, controvert the statement that the general policy of congress in making provision for the support of the government is otherwise. All of these cases may be taken as exceptions. Congress makes them unwillingly. It looks upon them as exceptions to its general policy of specification in all practicable detail. As soon, and as far, as it can secure the basis upon which to act, it eliminates them. This spirit can be traced in the policy pursued in respect to many services and lines of work. When new services or lines of work are first established or inaugurated, congress, from lack of information, has been forced to make the appropriation for their support in general terms. From year to year, however, progress is made towards greater definiteness as regards the manner in which the appropriation shall be expended until finally a condition of detailed specification is reached. We may thus say that the policy of congress, no matter how many exceptions may be pointed out, is to determine in advance, as far as it is practicable to do so, the precise manner in which all moneys appropriated shall be expended.

Is this the correct policy? Does it lend itself to economy and efficiency in the conduct of government? If not, what policy should be pursued?

To answer these several questions it is necessary to recognize that the matter of appropriations has two sides. It must be looked at from

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the legislative as well as from the executive viewpoint. In respect to the operations proper of the government, congress has three important functions to perform. It is its duty to direct, to finance, and to supervise. Upon it falls the obligation of determining what shall be activities of the government, of providing the funds for their conduct, and of seeing that the directions given are observed and that the moneys voted are expended in a proper manner.

This separation of the functions of congress in relation to administration is of importance, since the administration, chafing against the rigid restrictions placed upon it, seeing its hands tied in respect to the expenditure of funds, and finding itself often in a position where it can not meet emergencies as they arise, is apt to lay the whole blame upon congress. To it the policy pursued by that body is simply the result of the desire of the latter to be the dominating factor in respect to the conduct of affairs, as but an evidence of the wish of persons to magnify their importance and exercise all the authority they can grasp.

This feeling, natural as it is, is, in the opinion of the writer, an unjustifiable one. Congress seeks to specify in the greatest practicable detail how money shall be expended, not because it desires to usurp the functions of the administrator and to deprive the latter of all initiative and discretion, but because it is the only practicable way that it has discovered by which it can exercise its function, which all must agree is its, of supervising and controlling the manner in which the executive performs its duties.

It should be remembered that where discretion is lodged in executive officials in respect to the expenditure of funds such officials are subject to much the same pressure from the outside as are members of congress. If the matter is one of prosecuting work in this section of the country or in another, or of maintaining this station and abolishing that one, of fixing the compensation of this official or that at a high or low figure, pressure exceedingly difficult to resist by or on behalf of the sections or persons interested will immediately develop. Anyone familiar with the details of government work can mention any number of cases where the grant of executive discretion has been abused. Many cases where appropriations in detail have been substituted for appropriations in general terms have been directly due to the attempt on the part of congress to prevent in the future abuses which have occurred in the past. The problem is thus by no means as simple as it would at first sight appear. We have here conflicting considerations which it is by no means easy to harmonize, yet harmonized the writer believes they

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can be if the device and practice advocated in the present paper are followed. That this device and practice may be clearly understood it is necessary that one other principle of administration should be discussed.

Supervision and control, such as is the function of congress in respect to the administration, can be exercised in two ways. If a board of directors of a corporation with headquarters, say in Washington, has the duty of directing and controlling the operations of a number of establishments located at different points, it can exercise this function by either: (1) laying down the rule that the managers of their several establishments shall undertake no work and incur no expenditures until they have received previous authorization from the board; or, (2) it can formulate a general program of work, place at the disposal of the managers funds believed to be sufficient to permit of the carrying out of such program, and then exercise supervision over the manner in which this trust is discharged through the requirement periodically of detailed reports showing monthly how the money has been expended. Under one system, control is exercised through direction in advance; under the other, through the requirement of rigid accountability for work done.

There is here presented a clear-cut choice of methods. Everyone making use of agents for the carrying on of a business has to make choice of the extent to which he will rely upon one or the other. What the choice will be is determined largely by the extent to which it is possible for the person directing the enterprise himself to determine in advance what his local manager should do. There can be no question that in enterprises comparing in scope and complexity to government operations, the second of the two methods of supervision and control will be the one adopted. In this way, and in this way only, can it be hoped to secure real efficiency and economy in operation. This is the method, therefore, that is adopted by all large private enterprises. Congress, with its policy of detailed appropriation acts, bristling with limitations of all sorts, has adopted the former. Now why has congress pursued this policy? Congress is composed to a very considerable extent of members familiar with business practice. It has done so, not because it was ignorant of the disadvantages incident to the attempt to prescribe minutely in advance what shall be done. No one knows better than the members of congress, and particularly those serving on the appropriation committees, how bad are the results in many cases of this attempt to tie down the administration, to circumscribe their discretion, to limit their authority. It has made the election simply

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because it saw no other way out. It was either that or an abandonment on its part of the attempt to exercise the obligation clearly resting upon it of supervising, and, in the last resort, controlling the conduct of government affairs. Fundamentally, therefore, the adoption of the present practice of detailed appropriation bills, of the policy of directing rather than supervising, is due to the failure to develop means through which the latter policy may be effectively employed.

The foregoing may seem to be a very indirect method of approaching the subject to which this paper relates. It is impossible, however, properly to support a proposal of means for the solution of a problem until the contents of the problem are clearly understood. Until we know just what are the proper functions of congress in respect to financing the administration, the difficulties that it has to contend with in discharging these functions, the possible lines of action that are open to it, and the reasons which have dictated the choice made, we are in no position to consider intelligently any proposed departure from this practice.

All that has been said up to the present time has had for its purpose to make clear certain fundamental propositions. These are:

1. That, as regards the administration of public affairs, Congress occupies precisely the position of a board of directors of a private corporation.

2. That as such board it has the function of determining, in general terms at least, what such public corporation shall do, of providing the funds with which such work may be done, and of exercising such supervision as may be necessary to insure that its will is propery carried out.

3. That in discharging these functions, it is desirable, if the maximum of economy and efficiency is to be obtained, that it should formulate its directions in general terms, make available funds with only such itemization and restrictions as are necessary to insure that general policies in respect to work are carried out, and leave to the persons intrusted with the actual performance of the work the largest practicable discretionary power.

4. That such a policy can not be pursued without grave danger, unless at the same time effective means are provided by which congress may exert a rigid supervision over the manner in which this large grant of authority is exercized: just in proportion as authority is given, means of supervision must be strengthened.

5. That this policy, which congress itself would probably admit to be the correct one, is not now pursued, because, in point of fact, ade-

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quate means for exercising such supervision are not now available to it, and

6. As a logical deduction from the foregoing, that a change to the correct policy can only be expected as the result of the provision of such means.

It is the purpose of this paper to suggest a procedure which, in the opinion of the writer, will, if consistently carried out, furnish such means. This procedure consists in the adoption, as a matter of legal requirement, of what has been termed in the title of this paper the allotment of funds by executive officials. By allotment of funds by executive officials is meant that each official having responsibility for the expenditure of funds will, immediately upon knowledge being obtained by him of the funds that will be available for the operations of his service during the ensuing fiscal year, proceed to formulate an administrative budget or subappropriation scheme setting forth in detail how he proposes to expend this sum. Many services, to a greater or less extent, at the present time do something in the way of attempting to determine in advance how money at their disposal will be expended. What is proposed is something quite different from this. The proposal here made is: (1), that the allotment of funds in this way whall be a matter of legal requirement instead of depending merely upon the individual wills of the several service chiefs; (2), that this allotment shall be formally made in writing, with the result that there will be brought into existence an appropriation document differing in no essential feature as regards form from an appropriation act enacted by congress; (3), that allotment ledgers shall be opened up in the accounting offices of the services corresponding to the appropriation ledgers maintained by the accounting offices of the treasury department; (4), that changes in the allotment of funds thus made shall only be made by formal action in writing on the part of the allotting authority; and (5), that the financial reports of the services shall clearly set forth the allotment scheme as originally established, all changes subsequently authorized and the expenditures actually made under each allotment head.

It will be seen that what is here proposed is, in effect, the establishment by law of a formal scheme of administrative sub-appropriations. The term "allotment" is used merely for the purpose of better distinguishing between such appropriations and those made by congress. Its adoption would mean the creation of a chain or logical scheme of successive appropriation acts, each successive act supplementing the one preceding and fixing in greater detail the assignment of funds to partic-

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ular objects. Under this system congress will limit its action to the assignment of funds by main heads. The secretaries of the departments will take up the work where congress leaves off and make a further assignment of funds. The bureau chiefs will, in turn, allot these sums in still greater detail to the support of particular subdivisions of the work, or the support of particular units of organization, this process continuing as far as the conditions existing in the several services render desirable.

There are a number of features of this system, some of which will immediately suggest themselves: others are not evident except as an attempt is made to follow it in actual operation.

In the first place it means the substitution of a flexible for a rigid appropriation scheme. Where the assignment of funds is made in detail by congress there is little or no possibility of changing assignments to meet new conditions. If the amounts assigned to specific objects prove to be inadequate there is practically no remèdy and the government service suffers; if too large, the evil is scarcely less great. As the appropriation is made for a specific object any balance unused must be covered back into the treasury. As such balance is thus not available to the service making it for use by it for other purposes, all or nearly all incentive is removed for realizing economies.

Under the allotment scheme here proposed, conditions would be exactly reversed. Were it possible to apply balances of appropriations resulting from economical administration to other needs of the service, a strong stimulus to keep down expenditures would be immediately introduced. Not only would the original assignment of funds to specific objects be made by persons having direct and intimate knowledge of needs to be met, but changes could be made in such assignment from day to day as altered conditions required. The appropriating authority as regards details would be the secretary or bureau chief as the case might be. All that would be required would be the execution of an administrative order directing the transfer of allotments as required.

In calling attention to this feature of the scheme, the writer wishes again to emphasize the imperative necessity that all proceedings under it should be of a formal character, in writing, and made a matter of record. The whole scheme would break down unless these elements were present. This means that no change should be made in an allotment except upon a formal request in writing on the part of the officer desiring the change in which the justification for the request is set forth and that the action taken upon the request should likewise be embodied

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in a writing of similar character. These requirements mean not only that greater care will be taken by subordinate officials in estimating their needs and in formulating their requests to their superiors for the allotment of funds, but that they will only ask for increased funds when absolutely required. Each officer will be under a powerful incentive not only to keep within his limits but so to run his service as to realize a saving if possible. He will know that his record as an administrator will be much better if he can realize funds for other needs than if he has to be constantly running to his superior with requests for further allotments. This will be as true of the manager of the field station as of the bureau chief. There will then be an incentive to economy all down the line such as does not exist and can not exist under present conditions. It is the opinion of the writer that it is hopeless to expect any permanent and material improvement in respect to the economy and efficiency which with governmental affairs are managed until the system of government and its technical methods are so organized as to establish as a normal feature of its operation a real continuing incentive on the part of those in authority to perform their duties with all the economy and efficiency of which they are capable. It is one of the prime merits of the allotment plan here proposed that it lends itself to the introduction of such a feature.

In the second place such a scheme of allotments and allotment ledger accounts would bring into existence a system of financial records in each department or service through which the administrative heads would be kept in constant and immediate touch with the progress of work under their direction. The allotments in the first instance would be made on the estimates and supporting documents submitted by the chiefs of divisions, field stations and the like to the bureau chiefs and by the latter to the secretaries of the departments. The receipt and examination of these estimates and explanatory remarks would automatically compel each official exercising higher authority annually to review the work being prosecuted under his direction, consider proposals for new work and map out a program for the ensuing year. With this program embodied in its allotment appropriation document, the corresponding ledger accounts would show from month to month how the work, from a financial standpoint, was progressing. As no additional expenditure could be incurred without his express authorization, the allotting authority would perforce have brought to his attention all contemplated changes of importance. The administration would thus have, what he now too often lacks, a systematic scheme of accounts

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enabling him to keep currently informed regarding conditions and operations of the services under his charge. Full opportunities would be afforded for comparing one station or branch of the service with another as regards the same subdivision. Upon this scheme could then be built up a cost-keeping and unit efficiency record such as should exist in all services.

Turning now to the relation of this system to Congress, the significant features of the system are: that it integrates perfectly with the appropriation acts; that while conferring large discretion upon executive officers it compels these officers to act as formally as does Congress itself; that it makes it obligatory upon them to promulgate an official subappropriation act; that no change can be made in such measure except by way of formal amendment; that the same obligation is then placed on executive officers to canvass carefully each year the prospective needs of their services as circumscribed by the appropriation acts relating to them and of embodying their conclusions in a definite document; that systematic records will be kept of all changes made in the provisions of such document as first promulgated and all expenditures actually made in accordance with it.

All these data will not only be a matter of public record but properly should be set forth in the annual report and estimates submitted by the administration for funds for the ensuing yer. Indeed the scheme might well provide that the allotments in the first instance should be made by a certain date and copies of the allotment documents forwarded to the secretary of the treasury, and the clerks of the senate and house or clerks of the appropriation committees of these bodies. These could be assembled in such a way that when reprinted they, in connection with the appropriations bill would furnish a statement showing in detail its assignment of funds for the years operations. If deemed desirable the law might provide that copies of all documents authorizing changes in allotments as thus made should be forwarded to the same officers. Congress will thus be able to determine for itself just what disposition of funds has been made, what changes have been made over prior practice, whether certain sections of the country, stations, lines of work, etc., have been unduly preferred. Executive officials thus become true agents of congress in solving its general problem of assigning funds for the conduct of the government. Congress will continue to determine the character of the activities that shall be undertaken, to provide the fund that shall be available for such work and to supervise its execution.

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Instead of attempting, however, the impossible task of controlling through minute and inflexible instructions, it will control through definitely locating responsibility and requiring records, reports and procedure of such a character as will enable it readily to determine the manner in which authority delegated has been exercised.

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SUGGESTIONS FOR A STATE BUDGET

BY S. GALE LOWRIE

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Efficiency and economy in government involve in a large measure the question of budget control, and in the formulation of the budget, as well as in the carrying out of its provisions, the executive and legislative departments of government are brought into close relationship. The budget is the government's fiscal plan; it is the forecast of the receipts and expenditures for a terminable period. It should exhibit the amount of revenue to be raised in accordance with the plan and show the sources from which these funds are to be drawn, as well as the purposes of all expenditures. There must not only be a buget balance—a correlation of the estimated revenues and the expenditures of the state—but the proposed expenditures should be comparable, so that it may be easily determined how much it is proposed to grant for each of the several services. This necessitates the formulation by a central agency of a fiscal policy.

The first essential in the preparation of any budgetary plan involves the assemblage of estimated costs for the fiscal period. These estimates should be prepared by the administrative departments, because they are the most expert in their respective fields and most familiar with the costs which are to be expected to accrue during this time. Consequently the first step in the preparation of the budget involves the submission to a central agency of the departmental estimates. Here they must be so distributed over schedules as to exhibit for the departments and for the state as a whole, the estimated cost of government.

The question of what agency should digest the departmental estimates and recommend the tentative budget to the legislature is important. In parliamentary countries this is, of course, a cabinet function. In some of our cities it is done by an executive officer—the mayor or comptroller. Under the plan for a national budget submitted by the President's committee on economy and efficiency it is to be performed by the administration. It is important that this work be done, if possible, with the coöperation of legislative and administrative officials; otherwise,

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the situation met with in France is likely to be confronted, where the estimates of the administrative officials are practically disregarded and the appropriations formulated upon separate studies made by legislative committees. The possibility of having the board of estimates consist of representatives of the administrative and legislative departments is suggested by a law of the last session of the Wisconsin legislature, creating the state board of public affairs. This board consists of the governor, the secretary of state, who is also state auditor, the chairman of the finance committee of both houses, and three members appointed by the governor and approved by the senate.

The actal formulation and passage of the budget and the determination of the funds which will be available for the various services is a legislative function. The basis of their determination are, however, the estimates prepared by the various departments, who are the government's experts in their respective fields. In order that the greatest advantage be taken of the skill and judgment of these officials, it is important that the legislature should hamper them as little as is possible in the formulation and execution of their plans. In order that the departments may work to the best advantage, they should be permitted to a very considerable extent to make plans extending over a period of years and to use the funds allotted to their departments unhampered by detailed legislative restrictions. Satisfactory planning cannot be done upon a year-to-year basis. Just as a private corporation must frequently follow a course which it may take a long time to evolve, so many government services are best cared for on lines which may be developed through a period of years. But permanent plans are only possible under a system of permanent appropriations, and the yearly or biennial appropriation system, followed in many of our States and in the Federal Government, not only invites corruption, but is uneconomical.

Objection is raised to the system of permanent appropriations by those who see in it a derogation of legislative authority. But this method does not take from the legislature at all the power to determine policies by grants of this character. Under the system of annual or biennial grants it is necessary to gain the consent of both houses of the legislature and the governor, at each session, for the continuance of the services. Under the system of permanent appropriations it is necessary to get the consent of these three agencies to effect a change. The question is therefore whether, when the state has definitely embarked upon a policy of a permanent character, the burden of gaining the con-

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sent of all three agencies should rest on those who desire a continuance or a discontinuance of this course. I submit that the burden should rest upon those desiring a change in policy and that no injustice is involved in requiring those desiring the change to follow the course taken when the policy was originally adopted. What services are of a temporary and what of a permanent character is, of course, a question for legislative determination, but grants for the support of judicial, semi-judicial and educational institutions are especially of a nature which makes permanent appropriations desirable; so that it is beyond the power of one branch of the legislature or the executive to jeopardize their maintenance. A permanent system of appropriations will tend to take them out of partisan politics and permit them to operate under permanent plans for their most efficient conduct.

A difficulty with the permanent system of appropriations has been that once passed, they remain concealed in the statutes and are not submitted for a periodic review of the legislature, as are the temporary grants. This is not, however, a necessary or desirable feature of this plan. The annual or biennial budget sheet should contain all of the proposed expenditures, whether they are of a temporary or permanent character, and should show in parallel columns the receipts and expenditures of the state as recommended. The expenditures, however, can be easily divided to indicate what are permanent and what are of a temporary nature. Those of the first class, being already provided for by law, need no legislation unless changes are contemplated, while the latter class contains the appropriations yet to be granted. In this way the lawmakers have before them, when they are asked to pass upon the appropriations, the fiscal program which has been prepared and which shows not only the available income of the State but proposed expenditures of every character. Such a plan is followed in the submission of budget estimates in a number of Canadian provinces, and might be indicated as follows:

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EXPENDITURES					REVENUES	
SERVICES	APPROPRIATION OF PREVIOUS YEAR	DEPARTMENTAL REQUESTS	RECOMMENDATIONS OF BOARD OF ESTIMATES		SOURCES	AMOUNTS
			Already provided by law	To be provided by law		
A—					A—	
a.....					a.....	
b.....					b.....	
c.....					c.....	
B—					B—	
a.....					a.....	
b.....					b.....	
c.....					c.....	
C—					C—	
a.....					a.....	
b.....					b.....	
c.....					c.....	

The total expenditures recommended will be the sum of the totals of the column "Already provided by law" and of the column "To be provided by law," and must, of course, balance with the amount of revenue it is proposed to raise, and which should be estimated in detail on the budget sheet.

The actual formulation of the budget plan must be done by legislative agencies, but is it desirable that this work be done by a single committee of the legislature in order that it may embrace all projects of revenue and expenditure. For this reason the single joint committee on finance, such as is employed in Wisconsin and Maine, is highly desirable.

The question of the size of an appropriation is a relative one. It is not an absolute question of whether a given service is worth the money, but of how much should be devoted to that purpose, mindful of the total revenue available and the other demands upon the public treasury. The determination of this question is a function of a joint committee of the legisature, which must consider all projects for appropriations and all revenue measures and present recommendations to the legislature which show these expenditures and revenues properly correlated.

In countries with responsible ministries this is a function of the cabinet, which is in fact a committee of parliament. Here the theory of the location of responsibility has resulted in a development which has been

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followed in a number of cities and has been recommended for state and national use. When the English budget is reported by the government, it is incompetent for a private member to recommend any increases. But two courses are open to him: He may propose a decrease in the appropriation it is proposed to allow any service, either because in his judgment the grant is too large, or in order to call attention to its insufficiency, or he may introduce a resolution calling upon the cabinet to make a more adequate provision for a designated service. This latter course is seldom followed. No matter how carefully or scientifically the budget is prepared by the finance committee, if irresponsible members may propose changes respecting the various items, the balance is quickly lost and the budget is no longer a carefully constructed fiscal plan, but a crude compromise which has taken its shape on the floor of the houses. The budget of the finance committee should be prima facie the budget of the legislature and it should take a conscious effort on the part of the legislature to change it—it should not be subject to change at the whim of individual legislators.

It might be advisable to go even farther than this, and suggest that the budget estimate should not be changed upon the demand of either house of the legislature when the other house is in disagreement. When the two houses of the legislature fail to agree upon any aspect of the budget, it is not unreasonable to provide that the plan of the finance committee, based on careful study and full information, should stand. Such a plan might be put into force by having the budget introduced in the legislature by the finance committee as a single bill, and providing that this bill should be altered only in accordance with the specifications embodied in a joint resolution which should recite the portions of the bill it was desired to amend and state in what way the change was to be effected. Should the joint resolution pass both houses of the legislature, it should be mandatory on the finance committee to make required changes; unless both houses agree to the changes, however, the original plan should stand. In this way any change demanded by the legislature as a whole would be incorporated, but it would not be necessary to warp the fiscal program to supply funds for the projects of the individual legislators.

Lastly, every satisfactory budget system involves an audit—a periodic examination of the departmental accounts to determine with what accuracy and honesty the records have been kept. Whether the audit be conducted by an audit commission, as is done in California, or by an officer holding a permanent position removed from partisan influences,

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as in England, or by a permanent and independent bureau of a judicial character, as is done in Germany, it would be advisable for the audit report to be made to the board of estimates. In this way a far greater latitude may be allowed the departmental officers in the use of funds, and lump sum appropriations may be used to a much greater extent without danger of a misuse of public funds. The departmental chiefs may thus be held responsible for the most economical use of the grants for their respective services. The representations of the departments as contained in their estimates and upon which the appropriations were originally granted will be well known to certain members of the board —the chairmen of the finance committees; should there be a deviation from the plan in the actual expenditure of these funds, the departments must show that these changes were made in the interests of the public service, and this representation must be made to the same board which, a few months later, must pass on new estimates of these departments for a new fiscal period. In this way administrative officers are less hampered in the use of departmental funds, but are given the power and may be held responsible for their expenditures in the interests of the public service.

The submission of the estimates, the formulation of the budget plan, the passage of the budget bill and the examination of the departmental expenditures, complete the cycle of a proper budgetary procedure. The plan here suggested is new. As a whole it has never been tried, although nearly every phase has been recognized as a proper feature of an adequate fiscal program. It cannot be expected to work with the perfection attendant upon the English system, since we do not have the same centralized authority and responsibility which accompany their budget system from the time the estimates are prepared through to their adoption and the expenditure of the funds. It is believed, however, that there is here presented a workable budget plan which will permit, without radical changes in our legislative procedure or the relations between the executive and legislative branches, the use of the skill and judgment of the administrative officials to the greatest degree and still keep them responsible to popular control. The legislators and the general public will have before them at all steps of the budget progress full information respecting of the fiscal plan and be able to compare the amount of the anticipated revenue with the proposed expenditures and judge of the advisability of the proposed use of the public funds. These elements are essential to any plan which, through budget control, seeks to establish economy and efficiency in government.

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POLITICAL AND ECONOMIC INTERPRETATIONS OF JURISPRUDENCE

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Leaving out of account the eighteenth century natural-law thinking which still persists in some quarters, we may say that until recently Anglo-American jurists stood for a political interpretation of jurisprudence. English jurists maintain that position today. But the present fashion in America seems to be an economic interpretation. Not only is such an interpretation insisted on by many juristic writers, but nearly all recent discussions of judicial organization and of judicial power with respect to legislation proceed upon that basis. We have, then, two prevailing types of thinking in this country on the part of those who purport to treat the law scientifically. The one type is represented by the historical school, and is idealistic and political. The other type is represented by a phase of the sociological school—an early phase if we look at the development of that school the world over—and is mechanical and economic. The former looks on law as something which is found. It holds law to be something discovered rather than made. The latter looks on law as a product of the human will. The latter is an imperative theory, the former is not. Thus the distinction between these two types of thinking connects itself at once with a controversy that has gone on since the beginnings of juristic science.

There are two elements in a developed body of law. On the one hand there is an enacted or imperative element. This is today the modern element and so far as the form of the law goes, it is tending to prevail. On the other hand there is a traditional or habitual element. This is today the older or historical element, upon which judicial and juristic development proceeds by analogy. It should be observed, however, that not infrequently these positions have been reversed. The part of the law which is imperative in form has at times been the older element while the traditional element, because of some infusion of ideas from without, has been the modern element. Instances of this may be seen in the maturity of Roman law, in the period of natural

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law in Continental Europe, and to some extent in the development of equity and the absorption of the law merchant in our own legal system. Again the traditional element in time absorbs the imperative and transforms enacted rules into traditional principles. Thus at Rome the legislation of the Republic and of the early empire came to be of force only as embodied in the writings of the great jurisconsults. In the same way with us, the old English legislation is part of the common law as it was worked into that system by Coke. English statutes prior to colonization and to some extent prior to the Revolution are part of the American common law, and even relatively modern American statutes, which are sufficiently general to become the subject of commentary, are becoming truly part of the common law. Moreover the imperative element is often a mere authoritative declaration of principles which have been developed by and taken their form in the traditional element. As the traditional element is developed by judicial experience and its principles are worked out by juristic science into their consequences in detailed rules, these rules are given imperative form by legislation. Nevertheless, as the maturity of law culminates in a period of legislation, one who looks at a developed system is likely to perceive the enacted element chiefly and to take an imperative view. On the other hand, for the reasons stated, the historical jurist is certain to be impressed chiefly with the traditional element and to shape his ideas of law accordingly.

Another feature of the twofold composition of developed legal systems is of no less importance for the course of juristic thinking. The traditional element rests at first upon the traditional mode of advising litigants on the part of those upon whom tribunals rely for guidance or upon the usage and practice of tribunals. Later it rests upon juristic science and the habitual modes of thought of a learned profession. Thus the ultimate basis of its authority is reason and conformity to ideals of right. On the other hand the imperative element rests upon enactment. It rests upon the expressed will of the sovereign. The basis of its authority is the power of the state. In consequence, two distinct ideas of law are to be found throughout the history of juristic science.

Greek thinkers were the first to develop these ideas. The demand of Greek cities for publication of the customary rules of decision which were possessed as a class tradition by an oligarchy, resulted in a body of enacted law, at first declaratory only, but gradually by the easy step of publishing changes as if they were the established custom, a body of conscious and avowed legislation. Hence the law purported

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to be a conscious product of human wisdom. But philosophers began to enquire as to the relation of laws so constituted to the ideas of right and wrong. Was an act right, they asked, because it conformed to law, or were both the act and the law right if and in so far as they coincided with an absolute and eternal standard above the law? One answer was that what corresponded to the latter standard was natural right, but what corresponded only with the humanly enacted standard was conventional right, while others held that the whole matter rested upon enactment. Thus we have two ideas in Greek thinking about law; on the one hand the idea of law as human wisdom, ascertained and promulgated through the state, on the other hand the idea of law as the manifestation of an eternal and immutable right and justice. Roman jurists of the classical period put the latter idea into practical effect. In consequence the two ideas alternate in the history of Roman juristic thought. In Cicero, who lived in a transition period, we find both. In the classical jurists, in the golden age of juristic law making, reason and justice, to which the jurists of the time were striving to make the actual rules of law conform, alone are insisted upon. Later, as the law of the classical period was restated and systematized in the period of legislation and codification after Diocletian, the idea of authority prevails.

There is a similar alternation in the history of modern juristic thought. When the study of Roman law revived in the twelfth century, the *Corpus Iuris Civilis*, as legislation of the Emperor Justinian, was taken to be binding statute law. As soon as philosophical juristic thinking began, however, attempt was made to find a theological basis for the authority of legal precepts. Thomas Aquinas, whose views had the greatest influence in jurisprudence, conceived of natural law as that part of the eternal law, enacted by the supreme lawgiver of the universe, which man's reason reveals to him. Accordingly positive law did not rest merely upon human enactment; it was a recognition of the *lex naturalis* which was above all human authority. Presently, when an era of development of the legal system by juristic speculation was at hand, these theories had prepared the way for a return to the classical conception of reasonableness as the source of authority in law. In the seventeenth century two events of capital importance made for this revival of the classical idea. In the first place Grotius, even if he did no more than give currency to what the expositors of natural law had worked out already, emancipated jurisprudence from theology. In the second place, Conring, the true founder of modern legal history,

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overthrew the notion of the statutory authority of the *Corpus Iuris* in the modern world. Thus the question arose, what was the source of the authority of Roman law; for no one could doubt that it actually obtained in the forum. The only answer could be that it had been received as law and had obtained the force of a customary law administered in the courts by long-standing usage. But this answer furnished no philosophical basis for the reception of a body of law which could no longer claim the authority of enactment. Accordingly the seventeenth century jurist turned to the theory of natural law, the theory that the ultimate criterion of the validity of legal rules, the test by which all legal rules must be tried, was conformity to the law of nature. And, thus as Grotius had substituted a philosophical natural law for the theological natural law of his predecessors, positive law came to be regarded as the application of reason to the civil affairs of men and the *Corpus Iuris* stood as its exponent on the Continent merely because of its inherent reasonableness. Where the sixteenth century jurist begins with a theological disquisition, the seventeenth and eighteenth century jurist begins with a discussion of the nature of man and the nature of human society. In practice this mode of thinking gave rise to a movement which is entirely comparable to the classical period in Roman law; a period in which the growing-point of law was to be found in juristic speculation under the influence of a philosophical theory. Until the rise of legislation upon the Continent, consequent upon the making over of the law by the jurists of this period, the philosophical theory held the field in jurisprudence. The great text-writers of the seventeenth and eighteenth centuries drew their theories directly or indirectly from Grotius. But these same civilians furnished a large part of the inspiration and also of the juristic principles upon which writers upon law of the first half of the nineteenth century proceed in England and in America. Thus the absolute idea of law, which prevails so largely among practitioners in America, comes from Grotius in two ways. On the one hand it comes through Blackstone and on the other hand it comes through American publicists in the eighteenth and nineteenth centuries who followed the Dutch and French publicists and civilians. The no less absolute idea which has prevailed so largely among American teachers of law represents a further development of these theories in the nineteenth century.

Up to this point the ideas of law resting upon authority and of law resting upon reason had alternated in juristic thinking. From the end of the seventeenth century they have a parallel development. One

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consequence of the theories of the law-of-nature school was a movement for legislation. Natural law was regarded as a body of eternal principles, applicable to all men at all times under all circumstances. It was held that this body of principles, as a complete whole, might be discovered by reason. Hence jurists conceived it was not merely their duty to criticize existing rules with reference to these principles. Even more, they came to hold, it was a duty to work out completey all the applications of these eternal principles and put them in the form of a code. Louis XIV, in the latter part of the seventeenth century, codified Roman-French law to no small extent through royal ordinances. About the middle of the next century a strong movement for codification set in and the consequent revival of the conception of law as enactment was furthered by the political ideas of an age of absolute governments. Until Kant, this insistence upon the imperative element becomes more and more marked. But the other conception persisted in juristic writing for several reasons. One was that international law occupied men's minds to no small extent. Almost without exception the great juristic treatises of this period are upon the law of nature and nations. But in international law legislation and an imperative theory were out of the question. Another reason was that the development of Roman law through juristic writing was still going on under the influence of the theory of natural law. Accordingly the period in juristic thought from Grotius to Kant is marked by two movements. First there is a juristic movement, proceeding upon the theory that the basis of law is reason, in which the ideas of right and justice are made paramount. Secondly there is a legislative movement, in which law is thought of as emanating from the sovereign and in consequence the idea of command comes to be paramount. Many eighteenth century writers, such as Blackstone, for instance, were quite unable to choose between these theories.

A new period in juristic thinking begins with Kant. The problem which confronted Kant and those who came after him more immediately was the relation of law to liberty. The juristic situation at the end of the eighteenth century involved a dilemma. On the one hand we live in an age of legislation in which there is and must be external restraint and coercion, in which a philosophy that speaks only of reason and ideal justice is not a philosophy of the law that is. On the other hand we live in a democratic age in which the arbitrary and authoritative must have some solid basis other than mere authority, and in which the individual demands the widest freedom of action.

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The question how to reconcile these two ideas, external restraint and individual freedom of action, is the clue to all philosophical discussion of the nature of law in the nineteenth century. Kant answered the question by working out thoroughly the purely judicial notion of justice, by formulating the idea of an equal chance to all, exactly as they are, to assert themselves free from all extrinsic or artificial handicaps, which goes so significantly by the name of legal justice. Savigny turned Kant's formula of right into one of law. Kant thought of right as a condition in which the will of one was reconciled with the will of another according to a universal rule. Savigny thought of law as the body of rules which determine the bounds within which the activities of each individual are secured a free oppurtunity. If we adopt an idealistic interpretation of legal history and conceive of the development of law as a gradual unfolding of Kant's idea of right, we shall understand the position of the historical school. For Savigny's school carries forward one of the two ideas which had been contending in jurisprudence in the eighteenth century. The element in law which the medieval jurists had rested on theology, the seventeenth century jurist had derived from reason, and the law-of-nature school in the eighteenth century had deduced from the nature of man, Savigny sought to discover through history. In effect, therefore, the historical school and the metaphysical type of the philosophical school, which prevailed in the first half of the nineteenth century, were closely akin. Each postulated an ideal or natural law. One sought to discover this ideal law through history, the other sought to find it through logical development of an abstract idea. Indeed it was not hard to reconcile these views. As the historical school accepted the idealistic interpretation of legal history, it was possible to say that jurisprudence had two sides. On the one hand it had to do with the historical unfolding of the idea of liberty as men discovered the rules by which to realize it, on the other hand it had to do with the logical unfolding of the principles involved in the abstract conception. Most of the German expositions of jurisprudence in the latter half of the nineteenth century proceed in this way.

The doctrines of the German historical school appear to have been first taught in this country in a course of lectures given by Luther S. Cushing at the Harvard Law School in 1849, published in 1854 under the title, *Introduction to the Study of Roman Law.* It is interesting to note that the late James C. Carter was a student at Cambridge the last year that this course was given, for unless the effect of early training

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is borne in mind, it is hard to understand how a jurist of his caliber could dogmatically assert Savigny's views in 1905. But the influence of the historical school did not become marked in America until after 1870, when American students had begun to go to Germany in increasing numbers and German ideas had taken root in our universities. In the meantime another influence had profoundly affected American legal thought. That influence was the political interpretation of legal history and the political theory of jurisprudence expounded by Sir Henry Maine.

Maine's doctrine is a political type of idealistic interpretation. For a purely ethical idea of right it substitutes a political idea of freedom. It sees in law and in legal history a manifestation and development of this idea. Hence it finds the end of all law in liberty, conceived in the sense of the widest possible individual self-assertion, and conceives of jurisprudence as the science of civil liberty. Doubtless you are all familiar with this interpretation. It assumes that a movement from subjection to freedom, from status to contract is the key to social and legal development. It conceives of social progress as an unfolding of the idea of individual liberty by relieving the individual from the constraint of social institutions. It conceives of political progress as a like unfolding of the idea of liberty, as a gradual limitation and direction of state action so as to make possible the maximum of individual self-assertion, which is taken to be the maximum realization of the idea of liberty. It conceives of jural progress as a progress from institutions in which rights, duties and liabilities are annexed to *status* or relation, to institutions in which rights, duties and liabilities flow from voluntary action, that is, are consequences of exertion of the human will.

This theory was so thoroughly adapted to the individualism which characterized the traditional element of our legal system for other reasons and accorded so well with the absolute ideas which our law books had inherited from the eighteenth century, that it soon got complete possession of the field. Much in American judicial decision with respect to master and servant, liberty of contract, and right to pursue a lawful calling, which it has been the fashion of late to refer to class bias of judges or to purely economic influences, is in reality merely the logical development of traditional principles of the common law by men who if they had not been so taught, read every day in their scientific books of the progress from status to contract and the development of law through securing and giving effect to the human will. "Talk of stubborn facts," says Dr. Crothers, "they are as babes beside a stub-

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born theory." So important is the traditional element in all legal systems that the history of law and the history of juristic thinking continually illustrate this proposition.

But in truth so far as developed systems are concerned Maine's famous generalization is drawn from the Roman law only. The main characteristics of *status* are that it is a condition which cannot be divested voluntarily and that rights, duties and liabilities flow from or are annexed to this condition of a person rather than his volition. Such conditions were numerous and important in ancient law. In the maturity of Roman law, in contrast, the theory of natural law put an end to most of these conditions directly or indirectly and the law sought to secure the will of the individual against aggression and to give effect to the will to create legal consequences wherever possible. Hence there was a progress from status to contract in Roman law, if we use contract to mean legal transaction. There was a progress from a situation where legal institutions paid no regard to volition to one where volition was chiefly regarded.

It is by no means so clear that the generalization may be applied to Anglo-American law. For a fundamental difference between the Roman system and our own is involved. The central idea in the developed Roman law is the will. All things are deduced from the will of the actor. In our law the central idea is rather relation. Thus in agency the Romanist thinks of representation of will, or of a power voluntarily conferred and of a legal giving effect to the will of him who confers it. Hence the civilian talks of a contract of mandate. But we think and speak rather of the relation of principal and agent and the rights and duties incident to or involved in that relation. The Romanist speaks of the contract of *societas*. We speak of the partnership relation. He speaks of a *locatio operarum*, a letting of services, we speak of the relation of master and servant. He speaks of family law. We speak of the law of domestic relations, and so on throughout the law. It is true this idea of relation is objected to by some of our jurists, who feel it is akin to the idea of *status* and hence that it stamps our law as archaic. But these objections come from English historical jurists who assume Maine's generalization, whereas the whole course of American legal development is belying it, unless, indeed we are progressing backward. Not to mention legislative limitations upon freedom of contract, which might conceivably be controversial, in the purely judicial development of our law we have taken the law of insurance practically out of the category of contract, we have taken the law of surety companies prac-

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tically out of the law of suretyship, we have established that the duties of public service companies are not contractual, flowing from agreement, but are quasi-contractual, flowing from the calling in which the public servant is engaged. What is this in each case, and these are among the most recent developments of the law, but the common-law idea of a relation, a relation of insurer and insured or public utility and patron, and of rights, duties and liabilities involved therein?

The economic interpretation of jurisprudence has been urged in Europe by two classes of writers. One of these is an offshoot of the Hegelians, which regards the history of law as an unfolding of an economic idea. The other is a type of sociologist, namely the mechanical or positivist type that sought absolute, mechanical social laws, whose inevitable operations produced all social, political and jural institutions, as completely apart from human will as the motions of the planets. One phase of this mechanical sociology identified these mechanical laws which absolutely determine the content of legal systems, with economic laws. A third class of writers has advocated the economic interpretation in America, namely, a group which regards law as a conscious product of human will, which finds the basis of legal obligation in authority, and conceives that the will of the state or the *Volksperson*, of which it holds the law to be an expression, is determined wholly by economic considerations. This group, since its starting point is essentially analytical, represents a phase of the nineteenth century development of the other of the two ideas which we saw contending in the eighteenth century.

Mechanical sociology has been so thoroughly criticized, from so many quarters, and by none more effectively than by sociologists, that its persistence in a type of recent juristic thinking might seem hard to explain. The explanation seems to be that this mode of thought was expecially congenial in jurisprudence, and so persisted longer than elsewhere, because of the influence of the historical school, which had been dominant so long. The ideas of the mechanical sociologists appeared to confirm the doctrines of the historical school. Hence many who were beginning to be conscious that the historical school could not hold the ground exclusively much longer, were able to flatter themselves that they were moving forward by giving to their old views a new form of mechanical sociology. Like the historical jurist the mechanical type of sociologist looked at law in its evolution, in its successive changes, and sought to relate these changes to changes undergone by society itself. The historical jurist found metaphysical laws behind these

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changes. The mechanical sociologist substituted physical laws. For all practical purposes the result was the same. Theories of law come readily to be theories of law-making. Everything that has been urged against analytical and historical jurisprudence upon this ground applies even more to this mechanical sociological jurisprudence. If law is an inevitable resultant, if in making or finding it legislator or judge is merely bringing about "'conformity to the *de facto* wishes of the dominant forces of the community," conscious effort to improve the law can be effective in appearance only. The eighteenth century theory even if it put the basis of legal systems beyond reach of change moved us to scan the details and to endeavor to make each part conform to the fixed ideal plan. It admitted that legislator and jurist had each a function. The historical school denied any function to the former. Those who adhere to this type of economic interpretation deny it to the latter. To the doctrine of legislative futility they add a doctrine of juristic futility. But in truth this theory has been arrived at quite as much *a priori* as any of its predecessors. For no great acquaintance with legal history is required to enable one to perceive that the "declaration of the dominant social organism by which a legal standard is created or imposed" may or may not establish itself in the legal system. The Roman law of juristic acts has not become the law of the world nor is the Anglo-American law of torts becoming a law of the world because either has behind it a dominant social force. Much that has such a force behind it in the sense with which we are here concerned leaves but a faint mark upon the law. In the long run the quest of jurists and judges for an ideal of an absolute eternal justice, well or ill conceived, to which they seek to make the rules enforced in tribunals approximate, and juristic tradition, that is traditional principles and traditional modes of reasoning therefrom have ever proved the chief influences in determining the bulk of the rules actually in force in legal systems. The conscious endeavor to adhere to the ideal and the necessity of working with the materials afforded by the received tradition and in the manner prescribed by the traditional mode of reasoning have proved a powerful check upon the personal inclination of judges and for the same reason a powerful check upon the operation of class interest. The many examples of legal opposition to new social needs of which advocates of the economic interpretation have been wont to make so much are sufficiently explicable in this way.

Like objections may be urged against the economic interpretation in the form it takes with those who start from the analytical position

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and think of the law as something shaped consciously by class interest. In the first place theirs is a theory of legislation rather than of law; a theory of the will element, the imperative element, rather than of the reason element, the traditional element, which plays far the larger part both in the actual law and in legal history. Moreover it is a theory of that least important part of legislation which arbitrarily seeks new paths. Hence it interprets the least enduring part of present law and the least significant part of legal development. We must not forget that the administration of justice aims consciously at more than the imperative type of economic interpretation will hear of. We must remember that measuring the administration of justice by the traditional legal ideal becomes a fixed mental habit of the lawyer before he is called upon to take a practical part therein. We must take account of the extent to which the human will is moved by tradition, professional criticism, the logical exigencies of a received system and many like factors even against self iterest.

Again history which is vouched for this doctrine does not sustain it. No action and reaction of men and no pressure of social classes as they have been at any given moment since republican Rome will explain the doctrine of impossible and illegal conditions precedent in wills. No theory of the power of the creditor class will explain the tendency of the benefit of discussion—a favor to debtors which arose when creditors were most considered—to disappear at the very time when both law and public opinion are becoming more and more tender of debtors. Neither case may be understood otherwise than through tracing its history as a struggle between authoritative tradition and the logical requirements of legal system. But such matters are of more importance in the actual law and have more significance for jurisprudence than the short lived penal legislation from which most of the data for theories of class struggle as the determining factor in jurisprudence have been drawn.

Legal history is full of cases in which judicial and juristic idealism has produced and enforced ultra ethical rules of conduct in advance of the ideas of the dominant or of any other class of the lay community. Instances are not wanting in modern times in which purely logical deductions from traditional principles in which no class had any interest have been imposed upon the mercantile community. One notable example is the legal conception of a partnership, a purely historical conception originating in the poverty of legal analogies in republican Rome which is fundamentally at outs with the ideas of merchants

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and with everyday modes of doing business. Nor are instances wanting in which a pure juristic tradition logically developed by lawyers drawn from the dominant social class has withstood the interest of that class.

If, then, the political interpretation fails when put to the test of application to the facts of Anglo-American law, the economic interpretation fails even more when applied to the traditional element of legal systems. The instances relied upon to make a case for it are explicable as logical developments of traditional principles along traditional lines, and legal history is filled with cases of important rules and far-reaching doctrines which it cannot explain. Each interpretation is too narrow for the legal science of today.

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THE THEORY OF THE NATURE OF THE SUFFRAGE

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The essential necessity and inherent importance of a broad constructive political theory is coming once again to be recognized. Over-emphasized and misapplied in the eighteenth century, a natural reaction against political philosophy characterized the nineteenth century. The swing of the pendulum is carrying us back in this present time once more to the appreciation of the value and importance of rational, synthetic generalizations regarding the state. The analytical, dispersive and monographic method of historical and political studies achieved great and lasting results, but today the general view, the broader vision, the deeper meaning, the larger unity are receiving increasing attention. We shall not abandon the positive results in scientific accuracy and wealth of data which detailed studies of institutions have afforded, but we shall insist more and more in the future upon interpretations which shall link together the results of scholarly research and provide us with a more profound and comprehensive knowledge of the truth. Not a revival of the *a priori* speculations of the eighteenth century, but a thoroughly inductive and scientific theory of the state is the highest aim and purpose of twentieth century political science.

The political science of the nineteenth century was chiefly interested in public law. It was the age of constitutionalism *par excellence*. The mechanism of government required elaboration and perfection. That work has not been completed, but it has progressed so far that we may begin to pause at intervals between the framing of new constitutions and administrative systems to ask ourselves what is the meaning of our work, upon what general principles are we proceeding, what signifies this institution, that tendency. That public law is at all times closely connected with political theory is more than obvious. The two have in all ages reciprocally influenced each other. The great decisions of our supreme court are all instinct with political theory. But this theory, as that which appears in formal treatises on political science, contains little that was not derived directly from the preceding century. Out-

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worn and untenable dogmas like popular sovereignty, the separation of powers, and natural rights still flaunt themselves unchallenged in serious political discussions. Even the social compact is not dead but continues consciously and unconsciously to influence the form which current political argument takes. While public law was experiencing the most wonderful and far-reaching development to meet the requirements of rapidly changing social and economic conditions, political theory remained almost stationary and today is altogether inadequate to explain and interpret the deeper meaning and significance of the modern state and its governmental organization. It behooves the earnest student of political science to restore political theory to the position of honor to which it is entitled by making it once again exercise not merely an adequately interpretative, but also a positively constructive function with respect to political institutions.

At the present time no phase of our constitutional government is undergoing such fundamental transformation or experiencing so important a development as the electorate. The changes are both structural and functional. Such proposals as those for woman suffrage, proportional and minority representation, the representation of interests, and those for plural and weighted voting, alter in essential particulars the structure of the electorate. In such movements as those for the initiative, the referendum, the recall, and the recall of judicial decisions, we encounter other measures which would extend the functions of the electorate far beyond anything that was thought possible by the most imaginative and sanguine reformer even a few years ago. The short ballot movement seeks, in another direction, to limit, in order to make more effective, the function of the electorate. Ballot laws and corrupt practices acts are inspired by the need for improving the methods by which the electorate performs its work. In these various proposals we are confronted with the most serious political problems of the day. Political scientists are probably devoting more attention to this field of public law than to any other. Ought not their work to be checked, guided and illuminated by a broad constructive theory of the nature of the suffrage? It is not the purpose of this paper to offer such a theory; the writer will be more than satisfied if he shall succeed in drawing attention to the importance of the subject, and in preparing the ground by a historical and critical examination of the various theories which have found acceptance in the past and which continue at present to command support.

Five distinct theories of the suffrage, arising in the peculiar circum-

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stances and conditions of different epochs of governmental development, have been utilized to explain or justify various electoral systems. These are (1) the primitive tribal theory which reached its fullest and most perfect development in the city-state of antiquity, that voting is a necessary attribute of membership in the state, that the suffrage is an adjunct and function of citizenship; (2) the later feudal theory, that the suffrage is an adjunct of a particular status, generally tenurial in character—a vested privilege, usually attached to the possession of land; (3) the theory of the early constitutional regime, that voting is an abstract right, founded in natural law, a consequence of the social compact, and an incident of popular sovereignty; (4) the theory which commands support from the majority of political scientists at the present time—the scientific theory of the suffrage—that voting is a public office, a function of government, that the electorate is an organ of the state like the legislature or the executive; and (5) the ethical theory of the suffrage, which, by no means dominant at present, bids fair to display increasing strength in the future, that voting is an important—indeed a necessary and essential—means for the development of individual character, for the realization of the worth of human personality. So far from the transitions from one theory to another being sharply marked, the changes have been most gradual, and with the general acceptance of one theory others have not disappeared but have continued to modify, in some degree, the conclusions which a strict application of the dominant theory would enforce. The practical result frequently reflects a compromise between theories in their essence incompatible. These several concepts display very clearly Vico's law of spiral progression. Taken together they certainly constitute a series in a line of evolution. But they likewise follow the law of action and reaction. The first, third and fifth are broad, equalitarian and inclusive in character; the second and fourth are more narrow, discriminating and preferential. At present all five of these theories can be clearly discerned influencing to greater or less extent political action and discussion. The theoretical basis for discussion and legislation concerning the electorate is a confused medley of these several conceptions.

The earliest theory of the suffrage is that which is found generally among primitive peoples—at least among those races from which our western civilization is derived. The Greeks perfected and developed, but never outgrew, this early tribal conception of the suffrage. The city-state of antiquity was looked upon as a natural and necessary

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phenomenon. In saying that man is a social animal, Aristotle meant much more than that he was merely gregarious. To him and to the Greeks generally, membership in the state was as natural, essential, and necessary a relationship as membership in the family. The state was the expanded family; it had evolved out of the family. In Sparta, indeed, it completely extinguished the family. So far from being an artificial relationship, citizenship was, like parenthood or sonship, thoroughly normal, rooted in nature. It was almost always inherited, very seldom conferred. It was consequently narrow and exclusive. Religion afforded at the same time its test and its sanction. Sharing the worship of the city and performing the rites of religion were the marks of citizenship, and this implied participation in all civil and political acts. In Sparta to cease to join in the public meals, which were the principal religious ceremony, meant ceasing to be a citizen, and ceasing to share in the work of government. In Athens a man could be tried and condemned for incivism, for disaffection to the state. Ostracism was not a punishment for crime but a means of eliminating an individual member who for any reason had become inimical or dangerous to the state. There was no separation or opposition between the state and the individual. It is as erroneous to speak of the individual being completely subordinated to the state in the city of antiquity as it is to describe the state as merely a means for individual self-realization. The ancient city was neither socialistic nor individualistic. The state and the individual were identified. No thought of a difference of interest, or conflict of purposes, ever entered the mind of the man of classic antiquity. The individual realized himself only in and through the state. The state existed for the individual, the individual for the state. There was absolutely no sphere of individual rights to be asserted and defended as against the state. Such a thing as a bill, or declaration, of rights would have been wholly incomprehensible. Voting on questions of policy or enacting administrative ordinances in the assembly, electing magistrates, serving in the jury courts and performing the functions of magistrate were never looked upon as the exercise of rights. They were simply part of the life of the city in which all citizens shared, as they shared in the religious worship or in the dramatic representations of the theater. No citizen was or could be indifferent to these important interests. No one could remain neutral in the discussion or determination of matters of the highest import to all and each. Thus there was no question of electoral qualifications, for all citizens naturally and necessarily participated in government. Aristotle discusses the

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question of who should be citizens, and holds the view that artisans and tradesmen, being incapable of virtue, i. e., of full and balanced manhood, are unable to be citizens. They ought not to be admitted to membership in the state for the same reason that slaves and chattels cannot share in the civic life. But this is a question of membership in the state, not of rights or of qualifications for the exercise of governmental powers. There is no thought of differentiating between citizens. The suffrage is not an abstract right, nor a vested privilege, nor a governmental office. It is merely a function of citizenship. After the democratic revolutions, which mark important epochs in the history of both the Greek and Roman city-state, the basis of government becomes less religious. A new principle, *τὸ κοινόν* in Greece, *res publica* in Rome, takes the place of the will of the gods as the determining principle. Government becomes in consequence democratic. The citizens in their collective capacity are recognized as the best judges of what is for the general weal and their functions are consequently enlarged. Much that was formerly left to the auspices and the oracles is now determined by the public assembly. But there is no change in the fundamental conception of voting as an inherent and necessary function of citizenship.[1]

This theory of the suffrage is, in essential respects, identical with that of the Germanic peoples of the early middle ages, though these did not develop it to the same point of perfection which it reached in the city-state of classical times. Participation in the *folkmoot* was an adjunct of membership in the tribe. Differences in rank and social status existed, but such distinctions involved no political inequality. In the national assembly all freemen appeared in arms and proposals were made by the chieftains or men of eminence. Opposition was expressed by loud shouts; assent by the shaking of spears or the clash of arms. All members of the tribe took part. As in the city-state, voting was an attribute of membership in the tribe, a function of citizenship.[2] The self-governing city-states of medieval and renaissance Italy, which in other respects bear so close a resemblance to the city-state of antiquity, reflect the same general theory of the suffrage. Citizenship, which was hereditary in certain families and was thus narrow and exclusive, carried with it *ipso facto* the right to share in the governing powers. In all of these communities the only qualification for the suffrage was membership in the state.[3]

[1] On the theory of the suffrage in the city-state of antiquity, cf. Fustel de Coulanges, *The Ancient City*, bk. iii, chs. xii, xvii; bk. iv, ch. ix.

[2] Tacitus, *Germania*, ch. 11, in Stubbs, *Select Charters*, pp. 56, 57.

[3] Symonds, *Renaissance in Italy: The Age of the Despots*, ch. iv.

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This theory, while generally superseded in our own times, has continued to exercise some influence upon our ideas of the suffrage. Citizenship is still a qualification for voting, though it is no longer the sole or all-sufficient test. The two ideas of the suffrage and citizenship, which by modern theories ought to have no relation with each other, are generally more or less closely connected, if not confused. Our naturalization laws, and the proposals for higher qualifications for admission to citizenship, proceed from the principle that the electorate should be safeguarded from an infusion of unfit foreigners. Instead of directly establishing adequate educational and moral requirements for voting, applicable to citizens and aliens alike, we seek to accomplish the same end by the indirect means of limitations on naturalization. It is true that a few of our states admit to the suffrage aliens who have declared their intentions of becoming citizens, but even this is generally viewed as a questionable practice. The notion that the suffrage is an adjunct of citizenship still holds sway. Would we not be wiser to recognize at once that citizenship is no security for the proper performance of the electoral function, as alienage is no evidence in itself that a person may not exercise that function wisely? Ought we not to admit to our citizenship all aliens whom we can safely admit to the country, upon satisfactory evidence that they really desire to throw their lot in with us; and then establish such qualifications for the suffrage, entirely independent of citizenship, as are necessary to make the electorate a fit instrument to perform the functions with which it is invested?

The second theory of the suffrage is the product of the later middle ages. The political theory of this period has not received the consideration by English and American scholars to which its importance entitles it. The stage of political evolution, which continental students characterize as that of the "estates state," has been neglected by Anglo-Saxon writers, who erroneously treat English constitutional development as following a line of its own, essentially different from that which government took upon the continent. It is true that special conditions and circumstances produced somewhat different results in particular details in England, but these have been exaggerated into an essential difference in the main line of progression. English constitutional history is treated as *sui generis*, as having little in common with continental history. In fact, government in England and upon the continent passed through the same important stages of evolution. There was an "estates state" in England, which was in essential attributes identical with the "estates state" of France and Germany. In England the

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period precedent to the Yorkist-Tudor absolutism has been looked upon as in essence identical with the modern constitutional state. The Tudor regime, instead of being treated as a necessary and essential stage in the evolution of government, is viewed as an interruption, a temporary retrogression, in the normal development of political institutions. The significance of absolute monarchy, as a necessary condition to the subsequent development of constitutional government, is totally lost sight of, and connections between the modern constitutional state and the medieval "estates state," which are merely historical, are elevated into legal identities. We continually read back into the pre-Yorkist era our own ideas of balanced constitutional government, ministerial responsibility, the legal omnipotence of parliament, popular representation, and the political supremacy of the electorate. Such ideas, which are the heart and substance of modern constitutionalism, were as foreign to the thoughts of medieval England as they were to the thoughts of medieval France or Germany. They all imply a recognition of the sovereignty of the state which was only attained through the agency of absolute monarchy. The "estates state" was a regime in which sovereignty had not yet become established. The modern conception of the state as a juristic personality, exercising a complete supremacy within the confines of its territory and absolutely independent of external control, was the product of monarchical absolutism. In the place of this fundamental notion, the "estates state" displays the aspect of several corporate bodies within the state contending among themselves for power and supremacy. The "estates" were not representatives of the people. There was no united and common people who could be represented. The two houses of parliament in the pre-Yorkist era, as similar institutions upon the continent, were not organs of government formulating and executing the will of a sovereign state; they were rather corporate bodies seeking to further, either in opposition or union, their own peculiar and special interests and the enhancement of their own power and authority. The house of lords was not an organ of government or of the state, but the organ of the corporate aristocracy. The house of commons was the organ of the associated "communes" and the corporate landed interest of the country. Parliament was the "states general" of England—the assembly of the various corporate estates of the realm.

What was the theoretical basis of the suffrage by which members were chosen to the house of commons in England, to the states general in France, and to similar bodies elsewhere in Europe, before absolutism

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became dominant and such assemblies either ceased to exist entirely or became mere tools and instruments for despotic power? The right to choose members of these bodies rested upon exactly the same basis as the right of the nobles to be summoned in person to the house of lords or the assembly of the notables. Voting was an adjunct of a certain status; it was patrimonial in character, a privilege which attached to the status of tax-payer, or freeman, or burgess, or potwalloper, or forty-shilling freeholder. It was generally, if not always, connected with the possession of land and was thus tenurial in character. Often women who possessed the status had the electoral privilege, just as noblewomen frequently had the right of being represented by proctors in the estates of the nobility. In choosing members of parliament, the elector was not exercising, as in the city-state of antiquity, a function of citizenship; nor was he performing a public governmental office; nor realizing an abstract right. The product of the medieval "estates state," and rooted deep in the peculiar conditions of that regime, this vested privilege theory of the suffrage, nevertheless, by no means disappeared with the establishment of the modern constitutional state, but has continued down to our day to exercise a considerable influence upon the law governing the electorate. We shall observe how this theory received a clear and forcible expression in the discussions of the council of the Commonwealth army in 1647. A good statement of it is found in the opinion of Chief Justice Holt in the case of Ashby vs. White (1704) in which he says: "The election of knights belongs to freeholders of the counties, and it is an original right vested in and inseparable from the freehold, and can no more be severed from their freehold than the freehold itself can be taken away. . . . . As for citizens and burgesses, they depend on the same right as the knights of shires, and differ only as to the tenure, but the right and manner of their election is on the same foundation."[4]

This theory was evidently the basis for the charter of liberties and privileges adopted in the colony of New York in 1683, which provided "that every freeholder within this province, and every freeman in any corporation shall have his free choice and vote in the Electing of representatives, ... and by freeholder is understood everyone who is so understood according to the Laws of England."[5] The notion of vested privilege remains even today in England the theoretical basis

[4] 2 Ld. Raymond 938, in 1 Smith's *Leading Cases*, 9th Amer. ed., p. 480.
[5] Bishop, *History of Elections in the American Colonies*, p. 20.

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of the suffrage. McCrary in his *Law of Elections*,[6] declares: "In England the right to vote is a vested right attached to and inseparable from an estate of freehold, and the right can no more be taken away than the freehold itself." The extension of the suffrage in England has not been accompanied by any other more modern theory; the public law, in this respect is not now, and never has been, the application of the abstract, natural right theory of voting. The suffrage at present does not rest upon any single broad principle; it continues to be attached to a number of special statuses. Where a man is possessed of more than one status, it is significant that he enjoys more than one vote. This theory is chiefly responsible for the various systems of weighted or plural voting, such as the three-class systems in Prussia. It is the basis for the distinctions between tax-paying women and other women, between widows and spinsters on the one hand, and married women on the other, which certain schemes of woman suffrage embody. Property qualifications for voting, wherever they have existed, are rooted in this theory of vested privilege.

The third theory of the suffrage, that voting is a natural right, though directly connected with the establishment of the modern constitutional regime, can be traced in its origin far back into the middle ages. Connected, as it is, with the doctrines of natural law, social compact and popular sovereignty, its germ is indeed to be sought in Greek philosophy and Roman law. It is clearly suggested by Thomas Aquinas. Resting his entire theory on natural law, he maintained that the supreme power belongs to the multitude as a whole, or to that one who represents the multitude. Power is originally in the hands of all, and especially vested in one or more who are accounted the representatives of the multitude. It is therefore by the title of representative of the multitude that a prince or magistrate can enact laws. If a people has a right to make a king, it has the right to depose him. In performing his function unfaithfully the king has deserved that the pact between himself and the people be not observed by them. He goes even farther in declaring that in a properly organized state, it is necessary that all should have a share in the government.[7] Marsiglio of Padua, in defending monarchy as a type of government, insists upon an election as the only legitimate basis for this institution. The prince is put at the head of the state through the act of election by the community of the people, and all his authority

[6] §9.

[7] Cf. Janet, *Histoire de la science politique*, i: 384-387.

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he has received from them. As the supreme power in the state, the people have the right to make all the laws. In case of dispute the majority must rule. In the assembly every man has the right to propose laws; though legislative initiation may for practical reasons be delegated to a body of wise men who lay their proposals before the assembly of the people for their discussion and approval. The prince is merely the executive agent of the lawmaking body, and his action is at all times limited by law. He may, if he oversteps the powers conferred or violates the laws, be deposed by the lawgiving people. The same ideas are found in William of Ockam. Originally, he holds, all men were in a state of nature, and lived according to natural and divine law. After the Fall, it became necessary to constitute the state, which was accomplished through a general compact. A prince was elected and the people bound themselves to obey him so long as he ruled for the common good. The people, however, retained the right of lawmaking, since this belongs to all mortals on the principle that what touches all must be acted on by all. They may delegate this power to agents, but these are confined within the authority which has been distinctly granted. A prince upon whom such power has been conferred may, if he transgresses the limits of his authority or violates natural or divine law, be deposed. The same principles which by natural law lay at the foundation of the state are equally applicable to the church.[8]

During the conciliar period, in the fifteenth century, still more definite expressions of the theory of an abstract right to vote are to be found. Nicholas of Cues perhaps most fully elaborates this idea. All earthly power, he holds, emanates ultimately from God, but the organ for this divine manifestation is the will of the community, which is looked upon as God-inspired. The divine character of government is revealed in the voluntary consent of the governed. Thus all *jurisdictio* and *administratio* are based upon *electio*. A voluntary delegation by the community, or a majority of the people, is the only basis for the exercise of power and authority. Only such a ruler as has been freely elected is a rightful bearer of the common will. Only by recognizing himself to be the creation of the whole does a ruler become the father of its several members. Even within the scope of his powers a ruler is subject to constant supervision by the people, and they have the right

[8] Sullivan, *Marsiglio of Padua and William of Ockam*, in *Amer. Hist. Rev.*, ii, pp. 409–426, 593–610.

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to depose him in case of his transgressing the laws which they have laid down. Lawmaking by its very nature is reserved to the community, since the obligatory force of all laws rests in the common consent of those subject to the laws. All this is the imprescriptible and inalienable right bestowed by the law of God and nature. The government of the church rested upon the same basis as the state. Election was the medium by which the general will, the *communis consensus*, was expressed. From the pope himself to the lowliest parson, all church officials ought to be elected either directly or indirectly by the body of the church.[9]

In the writings of the Monarchomachi of the sixteenth century, such as Hotman's *Franco-Gallia*, the *Vindiciae contra Tyrannos* and Buchanan's *De Jure Regni apud Scotos*, in Hooker's *Laws of Ecclesiastical Polity*, and Althusius's *Politica Methodice Digesta*, as also in Calvin's *Institutes* are to be found various elaborations of the doctrines of social compact and popular sovereignty, with occasional suggestions in the direction of an abstract right to vote. But on the whole these writers are feudalistic and aristocratical in their tendency, not equalitarian. They desired to establish the "estates state" upon a substantial theoretical basis. Their writings must not be viewed as constituting the foundation of the popularly-based, modern, constitutional state. No more definite statement of the theory of a natural right to vote is found before the seventeenth century than that of Nicholas of Cues.

The seventeenth century in Englandis a long period of political travail in which the modern constitutional state was born. It is in this era that the doctrine of abstract right is first fully developed and bears fruit in actual political institutions. The absolutism of the Tudors had accomplished the work of crushing out or completely subordinating all the various elements of the "estates state" to the state itself. The state was sovereign. The dominant question of the Stuart period was, therefore, not as to the amount of independence or subjection which each of the rival corporate elements in the state should bear toward the others. It was whether parliament or king should be recognized as the ultimate and finally authoritative organ of the government in the sovereign state. In asserting its claim to political supremacy, parliament had recourse to the musty precedents of the earlier "estates state" period. Against the *jure divino* theory of monarchical absolutism, to which the courts were properly enough inclined to give effect, Eliot, Pym and Coke constructed a theory of parliamentary supremacy upon

[9] Gierke, *Political Theories of the Middle Age*, pp. 47–57.

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the basis of *Magna Charta*, *Confirmatio Chartarum*, the statute *de tallagio non concedendo* and the dicta of Bracton. That their doctrine had a certain substantial historical basis made it none the less revolutionary. Absolutism had intervened, and though they thought they were restoring the conditions of a precedent age, they were in reality creating a novel constitutional regime. This becomes obviously and consciously patent in the period of the Commonwealth, when men boldly cut loose from the thraldom of medieval ideas and undertook to construct avowedly new political institutions to meet the necessities of a new age. The movement was radical and extreme, but in the political discussions that accompanied it are to be found some of the most significant, because among the earliest, expressions of the political theory of the modern constitutional state.

The popular movement in the seventeenth century was quite as much religious as political. The ideas of the Puritans, and especially the Independents, concerning church organization were capable of, and early received, a political application. Starting from the premise of natural law and a social compact, Robert Browne, the founder of Congregationalism, defined a church as "a company or number of Christians or believers, which, by a willing covenant made with their God, are under the government of God and Christ, and keep his laws in one holy communion."[10] The right of each member to participate in church administration was a logical conclusion from this contractual basis of the church. Robinson states the principle clearly: "The elders, in ruling and governing the Church, must represent the People and occupy their place. It should seem, then, that it appertains unto the People—unto the People primarily and originally, under Christ—to rule and govern the Church, that is, themselves."[11] And again, speaking of the "proper subject of the power of Christ," he says: "The papists plant it in the pope; the Protestants in the bishops, the Puritans, as you term the reformed churches and those of their mind, in the presbytery; we, whom you name Brownists, put it in the body of the congregation, the multitude called the Church."[12] Cartwright and Travers insisted upon the election of ministers by the congregation.[13] Thus by the time

[10] *Booke which Sheweth*, Def. 35, quoted by Scherger, *Evolution of Modern Liberty*, pp. 122, 123.

[11] *A Just and Necessary Apology*, (1625), quoted by Scherger, *op. cit.*, p. 123.

[12] *Justification of Separation*, quoted by Scherger, p. 122.

[13] Vid. Gooch, *History of English Democratic Ideas in the Seventeenth Century*, p. 49.

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the Pilgrims sailed for the new world, the doctrines of the social compact, the supreme authority of the congregation, and the participation of all members in the government of the church were accepted and recognized principles. What more natural than that these ideas should be transferred to the political sphere when a new state was to be organized, which was in fact the congregation on its political side? The Mayflower compact merely embodies a political version of these doctrines. It is significant that servants and common sailors participated. The governor and council of Plymouth were elected by the votes of all, and were responsible to the popular assembly consisting of all male colonists of full age. The social compact theory, with the implication that all who have covenanted together to form the government have a right to vote, was the theoretical basis of the Fundamental Orders of Connecticut. In a sermon at Hartford, Hooker declared: "The choice of public magistrates belongs unto the people by God's own allowance. They who have the power to appoint officers and magistrates, it is in their power also to set the bounds and limitations of the power and place unto which they call them. And this, in the first place, because the principle of authority resides in the free consent of the people."[14] The government of Rhode Island, under its charter, was declared to be "democratical; that is to say, a government held by free consent of all or the greater part of the free inhabitants."[15]

Opposed to the Independents, the Presbyterians, following Calvin, held to a more aristocratic theory of church government. Authority and power in the church was attached to a particular status. It was not to be shared by all. The political application is made by Baillie, who declared that "The popular government bringeth in confusion, making the feet above the head."[16] "The Independents," wrote Clement Walker, "have cast all the mysteries and secrets of government before the vulgar, and taught the soldiery and the people to look into them and to ravel back all governments to the first principles of nature. They have made the people so curious that they will never find humility enough to submit to a civil rule."[17]

It was in the discussions of the council of the Commonwealth army, in connection with the submission of the Agreement of the People,[18]

[14] Quoted by Borgeaud, *Rise of Modern Democracy*, pp. 123, 124.
[15] Quoted by Gooch, *op. cit.*, p. 86.
[16] *Ibid.*, p. 179.
[17] *Ibid.*, pp. 169, 170.
[18] In Gardiner, *Constitutional Documents*, 2d ed, pp. 333–335.

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that we find the clearest expressions of the radical theories of government, and in particular of an abstract right to vote; and, in opposition, the patrimonial or vested privilege theory is also ably stated. This document, the work of the radical leaders of the army, the so-called Levellers, was drawn up and signed October 9, 1647. Among other demands, it contains the following: "That the people do, of course, choose themselves a Parliament once in two years." It was about this particular clause that the controversy raged. The Levellers, the authors of the Agreement, based their agitation upon natural law, which was at this time receiving novel and extended applications. Maintaining that the people had inherent, natural rights, "due to them by God's law of nature," they insisted that "It is equal, necessary, and of natural right, that the people, by their own deputies, should choose their own laws."[19] It is true that they occasionally speak of their "birthright," a term which suggests the vested privileges of the "estates state," and they fall into the confusion of joining their theory of abstract rights with that of vested privilege, or "native rights," as when they assert that "It is the first principle of a people's liberty that they shall not be bound but by their own consent; and this our ancestors left to England as its undoubted right, that no laws to bind our persons or estates could be imposed upon us against our wills, and they challenged it as their native right not to be controlled in making such laws as concerned their common right and interests."[20] But their chief reliance was upon an abstract right of nature, and, as the discussion proceeded, they abandoned the appeal to vested privilege, which was used as an effective weapon against them by their more conservative opponents.

The issue is clearly drawn in the council of the army when the Agreement was read and considered. Ireton demanded what was meant by "the People of England," a question which might very well be put to progressive political reformers in our own country at the present time. He wished to know if it referred to "those people that by the Civill Constitution of this kingedome, which is originall and fundamentall, and beyond which I am sure noe memory of record does goe" have the right of election, or to others.[21] To this question Colonel Rainborow's response is explicit: "The poorest hee that is in England hath a life to live as the greatest hee . . . . . every man that is to live under

[19] *The Leveller*, in *Harleian Misc.*, iv, pp. 545, 547, quoted by Scherger, p. 128.

[20] *Clarke Papers*, i, preface, pp. lxi, lxiii; *The Leveller*, as above, p. 543, quoted by Scherger, p. 130.

[21] *Clarke Papers*, i, pp. 299, 300.

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a Governement ought first by his owne consent to putt himself under that Governement; . . . . . the poorest man in England is nott att all bound in a stricte sence to that Governement, that hee hath not had a voice to putt himself under."[22] Rainborow insisted:[23] "I doe heare nothing att all that can convince mee why any man that is borne in England ought nott to have his voice in Election of Burgesses. Itt is said, that if a man have nott a permanent interest, hee can have noe claime, and wee must bee noe freer than the lawes will lett us to bee, and that there is noe Chronicle will lett us bee freer than that wee enjoy . . . . . I doe thinke that the maine cause why Almighty God gave men reason, itt was, that they should make use of that reason, and that they should improve itt for that end and purpose that God gave itt them. And truly, I thinke that halfe a loafe is better than none if a man bee an hungry, yett I thinke there is nothing that God hath given a man that any else can take from him. Therfore I say, that either itt must bee the law of God or the law of man that must prohibite the meanest man in the Kingdome to have this benefitt as well as the greatest. I doe nott finde anythinge in the law of God, that a Lord shall chuse 20 Burgesses, and a Gentleman butt two, or a poore man shall chuse none. I finde noe such thinge in the law of nature, nor in the law of nations." He pays his respects to the theory of vested privilege as follows: "As for this of Corporations itt is as contrary to freedome as may bee. For, Sir, what is itt? The Kinge hee grants a patent under the Broad-seale of England to such a Corporation to send Burgesses, hee grants to [such] a Citty to send Burgesses. When a poore, base, Corporation from the Kinge['s grant] shall send two Burgesses, when 500 men of estate shall not send one, when those that are to make their lawes are called by the Kinge, or cannott act [but] by such a call, truly I thinke that the people of England have little freedome."

In answering Rainborow's argument, Ireton clearly displays the fallacies of the theory of abstract right. "Give mee leave," he says,[24] "to tell you, that if you make this the rule I thinke you must flie for refuge to an absolute naturall Right, and you must deny all Civile Right; and I am sure itt will come to that in the consequence . . . . For my parte I thinke itt is noe right att all. I thinke that noe person hath a right to an interest or share in the disposing or determining of the affaires of the Kingdome, and in chusing those that shall determine what

[22] *Ibid.*, p. 301.
[23] *Ibid.*, pp. 304–306.
[24] *Ibid.*, p. 301, 302.

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lawes wee shall bee rul'd by heere, noe person hath a right to this, that hath nott a permanent fixed interest in this Kingedome; . . . . . that is, the persons in whome all land lies, and those in Corporations in whome all trading lies. This is the most fundamentall Constitution of this Kingedome, which if you doe nott allow you allow none att all."

Major Rainborow (to be distinguished from the Colonel) sounds a very modern and familiar note in the statement, that "The cheif end of this Governement is to preserve persons as well as estates, and if any law shall take hold of my person itt is more deare than my estate."[25] Pettus more explicitly developed the theory of an abstract right to vote from a social compact basis. "Every man," he said, "is naturally free; and I judge the reason why men when they were in soe great numbers [chose Representatives was] that every man could nott give his voice; and therefore men agreed to come into some forme of Governement, that they who were chosen might preserve propertie. I would faine know, if we were to begin a Governement, [whether you would say] 'you have nott 40 s. a yeare, therfore you shall not have a voice.'"[26] Again he declared: "If there is a Constitution that the people are not free that should be annull'd. Butt this Constitution doth nott make people free, that Constitution which is new sette uppe is a Constitution of 40 s. a yeare."[27] He admitted that apprentices and servants, and those who take alms, should be excluded, because they depend upon the will of other men whom they would fear to displease. They have in effect no will of their own. Another basis for asserting an abstract right to vote was advanced by Captain Awdeley, who said: "Itt is the right of every freeborne man to elect, according to the rule, Quod omnibus spectat, ab omnibus tractari debet, that which concernes all ought to bee debated by all."[28] On the other hand, Cromwell, who took little part in the discussion, held to Ireton's opinion. Rainborow's and the army's view would lead to anarchy, "for where is there any bound or limitt sett if you take away this [limit] that men that have noe interest butt the interest of breathing [shall have no voices in elections]?"[29]

In America the prevalent theory has been that of an abstract right to vote, resting on the premises of social compact and popular sovereignty. It comes clearly to expression in the period of the American

[25] *Ibid.*, 320.
[26] *Ibid.*, 312.
[27] *Ibid.*, 336.
[28] *Ibid.*, 340.
[29] *Ibid.*, 309.

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Revolution, as part of the general doctrine of natural rights which underlay that movement. In a "Declaration of the Rights of the Colonists as Men, as Christians, and as Subjects," which was written by Samuel Adams and presented to a town meeting in Boston on November 20, 1772, by James Otis, "The establishment of the legislative power, which itself cannot subvert the fundamental natural law of the preservation of society," is asserted to be one of the rights which no man can either relinquish or take away from others.[30] The principles enunciated in the Declaration of Independence, that governments derive "their just powers from the consent of the governed," and that "it is the right of the people to alter or abolish" tyrannical governments and institute new governments, may be taken to imply the theory of an abstract right to vote. A more definite statement is found in a resolution of a convention held in Ipswich, Massachusetts, in 1778, to consider the proposed constitution for that commonwealth. "All the members of the State," it asserted, "are qualified to make the election, unless they have not sufficient discretion, or are so situated as to have no wills of their own."[31] The early State constitutions and bills of rights contain numerous expressions of the theory of an abstract right to vote, but generally they are modified and confused by suggestions of the vested privilege theory. The Virginia bill of rights declares "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; that all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them; . . . . . that when a government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal; that all elections ought to be free, and that all men having sufficient evidence of permanent common interest with, and attachment to the community, have the right of suffrage." The Massachusetts constitution of 1780 declares that "The body politic is formed by a voluntary association of individuals; it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people that all shall be governed by certain laws for the common good." And in the bill of

[30] Quoted by Scherger, *op cit.*, pp. 186–188.
[31] Quoted by Ostrogorski, *Rights of Women*, p. 53, note.

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rights it is further declared that "All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers and to be elected for public employments." The New Hampshire constitution of 1784 declares: "All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good. All men have certain natural, essential, and inherent rights . . . . . All power residing originally in and being derived from the people, all the magistrates and officers of government are their substitutes and agents, and at all times are accountable to them. All elections ought to be free and every inhabitant of the state having the proper qualifications has an equal right to elect and to be elected into office."

The theory of an abstract natural right to vote comes out clearly in France during the revolutionary period. Montesquieu had declared that "All the inhabitants . . . . . ought to have a right of voting at the election of a representative, except such as are in so mean a situation as to be deemed to have no will of their own."[32] The writer has been unable to find any explicit assertion of an abstract right to vote in Rousseau, but it is a necessary implication and consequence of his social compact theory, and is at least strongly suggested in words. Scherger, in his brilliant little work on *The Evolution of Modern Liberty*[33] holds that "Nothing could be more erroneous than to attribute to Rousseau's influence the formation of the French Declaration of the Rights of Man . . . . . Rousseau's political philosophy, which aimed at securing freedom and equality, was destructive to individual rights. He has the individual surrender all his rights, without retaining a remnant of them, to the sovereign people or *volonté générale*." The writer is inclined, on the whole, to agree with this view. But it is obvious that there is one exception, viz. the right of the individual to an equal participation in the formation of the *volonté générale*. That is not surrendered. That is in fact the basis and essence of the whole social compact theory. Rousseau would not have assented to a declaration of the rights of man including the usual rights to the protection of life, liberty and property, to freedom of expression of opinion, and to freedom of association. But he must have agreed to the right to vote, not as precedent to, but as a consequence of, the social compact, and an

[32] *Esprit des lois*, bk. xi, ch. 6.
[33] Page 150.

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essential corollary of popular sovereignty. "From the counting of the votes," he says, "is obtained the declaration of the general will . . . This supposes, it is true, that all the marks of the general will are still in the majority."[34]

Rousseau's disciples, in 1789, were not so logically consistent. Sieyes,[35] his chief exponent at the time of the Revolution, not only developed the doctrine of natural rights, which was really no part of his master's system, but also grafted upon that system the principles of representation, to which Rousseau was radically opposed on theoretical grounds. On the other hand, he did not accept the notion of an abstract right to vote. He holds that a constitution, being necessary for the government of a state, its first need is a constituent body. But all citizens are not qualified to participate in the formation of such constituent body, nor of the constituted bodies which it may establish. He distinguishes between *droits passifs*, or those for the preservation and development of which the state is founded, and *droits actifs*, or those by which society or government is actually established. This distinction corresponds very closely to that between civil and political rights, as we understand the terms. All citizens, Sieyes maintained, possess the former, but not the latter. Women, children, foreigners, those who contribute nothing toward the maintenance of the public establishment do not share in the rights of constituting government. Hence his distinction between *citoyens passifs* and *citoyens actifs*. He adheres to the theory of social compact and the *volonté générale*, which he holds is an emanation of the nation, i. e., of all the people. But "the exercise of a public function is not a right but a duty, ... and the officers of the nation have beyond the citizens only greater duties." Here we get the first suggestion—merely a suggestion, for it is left entirely unelaborated—of a new theory of the suffrage which is to gradually encroach upon the theory of abstract natural right, the theory that voting is a public office or function of government.

The natural right view was, however, strongly defended by most of the leaders of the revolution. As early as 1787, Condorcet had declared:[36] "We would have a constitution, the principles of which are solely founded on the *natural* rights of man previous to social institutions."

[34] *Social Compact* (Social Science Series), pp. 200, 201.

[35] Cf. on the Po itical Theory of Sieyes, Walch, *La declaration des droits de l'homme et du citoyen et l'assembleé constituante*. pp. 84-86.

[36] *Lettres d'un Bourgeois de New Haven à un Citoyen de Virginie*, quoted by Ostrogorski, *Rights of Women*, pp. 25, 26.

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"One of these rights we consider to be that of voting for common interests either personally or by freely elected representatives. Is it not in their character of sensible beings, capable of reason and with moral ideas, that men have rights? Women, therefore, should have absolutely the same . . . . . Either no individual member of the human race has any real rights, or else all have the same; and whoever votes against the rights of another, no matter what his religion, his color or his sex may be, has henceforth abjured his own." Thomas Paine, in his *Rights of Man*,[37] declares that "The representatives of the nation [in France] which compose the National Assembly, and who are the legislative power, originate in and from the people by election, as an inherent right in the people." And he contrasts this with the basis of representation in England which consists in royal patents, and embodies a grant or boon. The declaration of rights of 1789 asserts that "The law is the expression of the *volonté générale*. All the citizens have the right of concurring personally or by their representatives in its formation."[38]

The electoral law of 1789, which came to be embodied in the constitution of 1791, did not give full application to the theory of an abstract right to vote which was so generally held. The moderates in the national assembly secured the adoption of a scheme by which territory and the amount of taxes paid, as well as population, should determine the number of representatives which each department should return; and the suffrage was restricted to those citizens who paid a certain amount of direct taxes. Against this system Bengy de Puyville fulminated in vain. Proceeding in his argument from a natural law standpoint, he urged that representation was an inherent right of every citizen, belonging to him by nature. Population alone should constitute the criterion for the distribution of seats. Robespierre argued from the declaration of rights, which had already been adopted, that all citizens had a right to participate in every stage of representation. Sovereignty belonged to the people, to all the individuals making up the people. Thus every individual has a right to a share in the framing of laws and in administration. If not, he asserts, it is not true that all men are equal in rights, nor that every man is a citizen. If he who pays a tax equivalent to one day's work has less rights than he who pays one equivalent to three days work, then the person who pays a tax equiva-

[37] Page 62.
[38] Art. vi.

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lent to ten days work must possess still greater rights, and so on up the scale.[39]

The radicals soon gained control of the National Assembly and the theory of an abstract right to vote received full application. In the electoral law passed on August 11, 1792, for the election of the national convention, the assembly proceeded from the view that it did not possess the competence to subject the sovereign people to regulations concerning the exercise of its rights of sovereignty, but merely suggested and requested that the elections take place at the same time and according to uniform principles.[40] With the establishment of the convention the abstract right of every individual, even including certain classes of foreigners domiciled within France, to vote was completely recognized, and universal, adult, male suffrage was thus established.

The directorial constitution of the year 1795 marks a reaction from the radical point of view, and contains similar limitations upon the suffrage to those enforced by the constitution of 1791. In reporting the proposal, Boissy d'Anglas characterized the constitution of 1793 as the organization of anarchy. Advantage should be taken of experience and *le gouvernement des meilleurs* should be established. The theoretical position of the committee was, however, confused. They declared that voting was not a function but a right, yet conditioned its exercise upon the payment of a public contribution. Thomas Paine led the opposition to the adoption of these restrictions, and maintained that each individual held his right of himself and from nature, and that no one had the right to deprive him of it. The refusal of the right to Frenchmen not inscribed upon the direct tax-roll was to treat the majority of citizens as helots. To this Lanjuinais replied that political rights are not veritable rights, and that if Paine's view were true it would be necessary to admit the insane, idiots, women, children and foreigners to the franchise. In spite of the committee's contradictory position, it is in this discussion that the idea that the suffrage is a public function of government, which presumes a capacity, begins to break through.[41]

The theory of an abstract right to vote has played a rôle, the importance of which would be difficult to exaggerate, in the determination of many of the most important problems of constitutional government.

[39] Cf. Meyer, *Wahlrecht*, pp. 50-58; Duvergier de Hauranne, *Hist. du Gouv. Parl. en France*, i, 120, 121; Buchez et Roux, *Hist. parl de la Rev.*, iii, 213; *Archives Parlementaires*, Bd. ix, p. 479, Bd. xxix.

[40] Meyer, *Wahlrecht*, pp. 64, 65.

[41] Duvergier de Hauranne, *op. cit.*, i, 340, 350; Meyer, 70, 71.

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It continues today to be the accepted view of the suffrage among the masses of the people,[42] and is an implied justification and basis of many of the political reforms connected with the electorate which have been achieved or are now being agitated. It is necessary to remind ourselves that untenable political dogmas have frequently served a useful end. Our whole system of international law rests, in its origin, upon the theory of natural law. The doctrine of the social compact supplied the need for a theoretical justification for the American Revolution. Our system of constitutional guarantees for individual rights has grown from the theory of abstract natural rights of the individual. The untenable doctrine of popular sovereignty has a long and notable history of achievement; it has for centuries been the most effective weapon in the hands of the champions of constitutional government. We must not, therefore, on the one hand, refuse to the doctrine of an abstract right to vote the credit of having accomplished great good because we see its fallacies, nor, on the other, accept the practical benefits which it has achieved as proof of its theoretical soundness. In the form which it has generally taken this doctrine is a consequence or corollary of the theories of social compact and popular sovereignty. These two doctrines are not necessarily connected; popular sovereignty has shown much more vitality and persistance than the social compact idea. The latter has been discarded by nearly all theoretical writers. It has ceased to play a very important rôle in popular political discussions. Popular sovereignty, on the other hand, continues to command the support of many trained political scientists, and is the generally accepted premise upon which popular discussions of political questions are still carried on. It is so directly connected with the subject of our immediate investigation that it, therefore, requires a brief examination. The writer is convinced that so long as the doctrine of popular sovereignty persists, that of an abstract right to vote will likewise continue to determine discussions of problems of electoral reform.

Sovereignty is essentially a legal conception. The idea originally developed in connection with the establishment of the national state. As the national state evolved out of the confusion and conflict of authorities of the middle ages, sovereignty came to be attributed to it, i.e., it came to be recognized as legally independent of all external control, and legally supreme with respect to all internal matters. This original

[42] "The notion," says James Bryce (*Hindrances to Good Citizenship*, p. 55), "that every man has a sort of natural right to vote is now generally diffused."

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meaning of sovereignty, as the attribute of legal independence and supremacy of the state, is the only proper and correct one. It was, however, in the era of monarchical absolutism, when the king could say with a large degree of truth "*l'état c'est moi*," a natural and easy transition from the idea of the sovereignty of the state to the idea of the sovereignty of the monarch who embodied all the power and authority of the state. Sovereignty thus came to be located in the head of the state. When constitutional government succeeded monarchical absolutism, parliamentary bodies arrogated to themselves this attribute of sovereignty. Instead of an attribute of the state, sovereignty came to be treated as the attribute of a particular organ of government. This theory could not, however, long claim general support. The elective character of parliamentary bodies was itself proof of their dependence. The difficulties are scarcely less insuperable if, instead of the ordinary constituted legislative bodies, the constituent constitutional convention be taken as sovereign. It too is dependent upon election. It too is not an original source of power but derives its authority from some ultimate source. With English writers a distinction was made between legal and political sovereignty. Parliament was said to possess only legal sovereignty. Political sovereignty was attributed to the people. This distinction has not been generally recognized outside of England, but sovereignty without distinction has been widely ascribed to the people.

But who are "the people" in whom sovereignty resides? The attempt to answer this question immediately discloses the utter fallacy of the whole doctrine. Is the people the electorate, which choose the legislative and perhaps the executive agents of the government? This is sometimes assumed to be the case. But the electorate is not legally supreme. It is subject at every turn to laws which it has no share in forming. Though it chooses the legislative body it is in turn determined by that body. What functions it shall perform and how it shall perform them is all a matter of law, statutory or constitutional. The legal power which it exercises is just as much derived, just as truly not original, as that of the constituted and constituent legislative bodies. The difficulties of this solution have often led to ascribing sovereignty to the entire mass of the people, the entire populace; and in reaching this conclusion, the social compact theory has greatly assisted. But here a different kind of difficulty is found. The people in this sense is certainly not legally determinable. In this broad meaning, the people is not a legal, but a sociological, concept. The people certainly influence, and frequently determine, political action, but it is not through

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legal means—it is through public opinion. The people's will is social, not legal, will. It may be admitted that in the modern state the fundamental requirement is that the legal agencies of government shall as adequately as possible express the people's will. But to determine what the people's will is recourse must be had to all the agencies of public opinion. A general election is a fairly safe index of the will of the people, but it is by no means entirely satisfactory. The press and the platform in all their various forms and manifestations are just as truly organs of public opinion as the electorate. But even were it admitted that the electorate is the highest authoritative organ of public opinion, that does not constitute it the sovereign; it is, like the legislative and executive agencies of government, a legally constituted organ of the state. In imputing sovereignty to the mass of the people, the transition is made from the socio-psychological to the legal domain. It is because this step is taken without appreciation of its significance, or real nature, that so much confusion exists with respect to the whole subject of the suffrage. It may be admitted that the ultimate socio-psychic impetus to political action in the modern state comes from the people, but this is not sovereignty; this is not exercising a legal supremacy. The people can not be said to be the supreme will-forming power in the state, because the state is a legal entity; its will is legal will, and this the people who are not a legal entity, nor even legally determinable, are quite incapable of forming. On close analysis, the so-called sovereignty of the people is seen to consist in three things: *first*, revolution, which is the ultimate extra-legal guarantee or sanction of government; *second*, the tacit acquiescence by which governments or constitutions are accepted, which is likewise extra-legal and psychological: *third*, public opinion, which is also an extra-legal and psychological means of control over the government.

The state is a juristic personality. Its will is legal, corporate will, like that of any private corporation. Who, it may be asked, is sovereign in a railway corporation? the president of the company? the board of directors? the body of the stock-holders? The answer is manifestly that no one of these is sovereign. All are organs for the government of the corporation, but its will is corporate will to which each and all contribute their quota. They may be, and often are, moreover, controlled by extra-legal influences. Public opinion has been known to operate at times even upon railway officials. Yet were this, in the golden age which some seers dimly discern in the future, to become the dominant influence, no one would be bold enough to suggest that the

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public were the supreme *legal* will-forming body in such corporations. It would still be absurd to maintain that the regulations of service, the orders by which various kinds of freight are classified, the decrees in regard to rates were legally ordained by the public. Yet this is exactly what we hear on every hand in connection with the state and its activities. The double meaning of the term "people" is the source of the confusion. The broad masses of the people are identified with the electorate, and sovereignty is imputed to this double headed monstrosity, which displays on the one side the form of a simple organ of government, and on the other the amorphous aspect of a socio-psychic association of human beings. Nor is the difficulty removed by describing the people's sovereignty as *political.* Political action is either legal, in which case the English writers have two legal sovereigns on their hands—a manifest absurdity; or it is psychological, in which case it is not and cannot be described as sovereign, which, if it means anything, means legal. The only consistent and rational solution is to treat the electorate as merely one of the organs of government, and the people as a distinct ultra-legal, sociological source of control.

The confusion of the electorate and the people, and the assumption that electoral action is the sovereign action of the state, with the implication that in voting the elector exercises an inherent and abstract right of sovereignty, has never been more noticeable than in the recent political campaign. The able chairman of the Progressive national convention in his brilliant keynote speech declared: "The rule of the people means that when the people's legislators make a law which hurts the people, the people themselves may reject it. The rule of the people means that when the people's legislators refuse to pass a law which the people need, the people themselves may pass it. The rule of the people means that when the people's employes do not do the people's work well and honestly the people may discharge them exactly as a business man discharges employes who do not do their work well and honestly. The people's officials are the people's servants, not the people's masters." The Progressive platform contains the provision, which we are authoritatively informed was drafted by the deans of two of our greatest law-schools:[43] "That when an act passed under the police power of the State, is held unconstitutional under the state constitution by the courts, the people, after an ample interval for the deliberation, shall have an opportunity to vote on the question whether they desire the

[43] Cf. *Saturday Evening Post,* October 26, 1912.

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act to become a law notwithstanding such decision." And the standard-bearer of the Progressive party himself has said: "We say that questions of fundamental justice are for the decision of the people themselves—for nobody else—and that in these matters the will of the people, deliberately expressed after full consideration, is to override the will of any or all of the servants of the people and is itself to determine what the fundamental law is to be. Therefore we insist that the people must have, wherever necessary, the right to a referendum as to whether they will accept or reverse the construction of the courts in a given case affecting social justice."[44] In all these statements is it not clear that the doctrine of popular sovereignty is made the basis of a demand for an enlargement of the functions of the electorate, the assumption being that the people and the electorate are identical? The initiative, the reverendum, the recall and the recall of judicial decisions are here not urged by the ordinary arguments of political expediency but are demanded as essential incidents to popular sovereignty and the abstract right of the individual to vote.

The demand for woman suffrage is often urged on similar grounds. The agitation for woman suffrage still too frequently takes the form of a demand for women's rights. "It certainly seems," says the last president of the American Bar Association,[45] "as if women were entitled to self-government as well as men. It is the Jeffersonian idea, and I believe it to be the true one, that all men are entitled not merely to wise government, not merely to honest government, but to self-government." What does this mean, if not that all individuals have an abstract right to vote? Any attempt to establish educational or moral qualifications for voters, or to withdraw from the suffrage classes, such as government employes, whose participation may prove inimical to general welfare, is immediately met by the assertion of each and every individual to an abstract right to vote as a corollary to popular sovereignty. The theory of an abstract right to vote implies the principle of majority rule. Proposals for proportional and minority representation run counter to this idea, and their adoption has been delayed and impeded by the widely disseminated notion of the right of a majority to rule. The abstract right theory also generally favors direct as against indirect elections. It is the life and soul of the doctrine of the imperative mandate, and the view that representatives are subject to the instructions of their constituents.

[44] *Ibid.*

[45] In his address before the Association in Milwaukee, 1912.

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Dominant still in the field of popular political discussion, the abstract right theory of the suffrage has ceased to command the general support of serious students of political science. In academic circles a fourth doctrine is gradually coming to be accepted, that voting is a function of government. The voter does not realize a primordial right of man when he casts his ballot; he performs a public governmental office. The electorate is not the people; it is an organ of government, established, organized and determined by the laws, by which it can, moreover, be limited, expanded or entirely abolished. There is no more excuse for talking of natural fundamental rights in connection with the electorate than in connection with the legislature. Both are organs of government; the size of the one as the size of the other, the character and organization of the one as of the other are matters of pure political expediency to be ordained by the laws, subject to alteration at any time. "If this body," says Professor Dealey,[46] "instead of being referred to as the 'sovereign people,' should be treated, from the legal standpoint at any rate, as a governmental agency, clearness in discussion would be gained." Professor Ritchie asserts[47] that "The suffrage, by all thoughtful persons at least, is regarded as a means to the working of the constitution; and the right of voting is obviously a right created by the law (whether special constitutional law or ordinary law), and cannot intelligibly be represented as a right prior to and independent of law. . . . . On whom the suffrage should be conferred is a matter not to be stettled *a priori*, but by the reference to the particular circumstances of the country." Says Ostrogorski,[48] "As to political rights, since participation in the government of the country—which is their very essence—presupposes a special capacity, and is by no means an integral part of human personality, nor requisite to its development, we judged them to be not an absolute, but a relative right, a creation of law. . . . . The government of the commonweal, not being the personal property of any one, neither a *caste* privilege, nor yet an hereditary right, is essentially an office performed in the general interest. . . . . Thus the question of admission to, or exclusion from, the government of the country, is independent of the principles of Law, and confined wholly to the sphere of politics." Bluntschli has written:[49] "The suffrage in the state and for political purposes is not a natural

[46] *Our State Constitutions*, Supplement to the *Annals of Amer. Acad.*, 1907, p. 6.
[47] *Natural Rights*, p. 255.
[48] *Rights of Women*, pp. 191, 192.
[49] *Politik*, p. 421.

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right of man, but a political right derived from the state and serving its ends. It does not exist outside the state nor in opposition to it. Not as men, but as citizens do the electors exercise this right. They have this right not of themselves, not because their personal existence and development demands it, but they have received it from the state's constitution and exercise it in the service of the state." Georg Meyer[50] asserts that the self-evident right of every man to vote has today scarcely a defender. It has been superseded along with the theory of natural rights of the individual. In scientific literature, especially in Germany, the predominant view is that which looks upon the suffrage as a public function. President Cleveland clearly expressed this view, in saying[51] that "Your every voter, as surely as your Chief Magistrate, under the same high sanction, though in a different sphere, exercises a public trust." Though still holding the doctrine of popular sovereignty, some American legal writers, as well as some of our courts, have recognized the functional character of the suffrage. The suffrage, says Judge Jameson,[52] "is not a right at all; it is a duty, a trust, enjoined upon, or committed to, some citizens and not to others." And again he declares: "Within the sphere allotted to the electors in the scheme of government, they constitute a strictly representative body. But it is only one of a number of such bodies." The supreme court of Maryland has stated its views as follows:[53] "The right of suffrage is not an original, indefeasible right, even in the most free of republican governments; but every civilized society has uniformly fixed, modified or regulated it for itself, according to its own free will and pleasure, and in these United States every constitution of government has assumed, as a fundamental principle, the right of the people of a state to alter, abolish and modify the form of its own government, according to the sovereign pleasure of the people. The right to vote like the right to hold office, being thus conferred upon the voter by the sovereign will of the people, in their organic law or constitution of government, the question, upon whom it ought to be conferred, and what should constitute its boundaries and limits—in other words, what should qualify and what should disqualify—is one which the people themselves are to settle." In this opinion, it is clear, the court identifies the people with a constitutional convention, which is no less absurd than their identification with the

[50] *Wahlrecht*, pp. 411, 412.
[51] Gilder's, *Cleveland*, p. 39.
[52] *Constitutional Conventions*, §§337, 332.
[53] Anderson vs. Baker, 23 Md. 596.

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electorate; but by this fiction the court manages to arrive at the correct view of the nature of the suffrage.

The conception of the suffrage as a function of government is the theoretical basis for such proposals as proportional and minority representation, the representation of interests, compulsory voting and the short ballot. The enactment of improved ballot laws and corrupt practices acts are in harmony with this view. The champions of these various measures maintain that their particular reforms will improve the character of the electorate as an organ of government. The point of view from which they proceed is that of governmental efficiency. In every case these proposals are urged on grounds of pure political expediency. The question is the same as whether in particular circumstances a legislative body should be unicameral or bicameral—how ought the organ of government to be constituted, with what functions ought it to be endowed, in order that its usefulness may be as great as possible.

Theoretically impregnable as the functional theory of the suffrage may appear, it is already threatened by a new, a fifth, conception of the nature of voting which promises to develop great strength and possibly to seriously modify, though it can scarcely supplant it. This view may be called the ethical theory of the suffrage. Based upon the Kantian postulate of human equality as the result of the moral worth of the individual, it is, unlike the functional theory, equalitarian in its spirit and tendency. It is not, however, a doctrine of natural rights. A broad doctrine of ethical equality is inherent in Kant's precept, "So act as to treat humanity in ourselves and in others always as an end, never as a means only." The moral worth of the individual human being is the source of the dignity of human life; it is what separates man by an immeasurable distance from the brute and the chattel. The enormity and the sin of slavery lies in its failure to recognize this common quality of moral worth which binds all humanity in one great brotherhood. Equal moral worth was the essence of Lincoln's idea of human equality. The ordinary civil rights to the protection of life, of liberty, of property, find their *raison d'etre* in the equal moral worth of all individuals. Moral worth is not a passive but an active quality. It embodies a capacity for action. Civil rights find their justification in the natural desire to afford the necessary means for the fullest possible ethical self-realization. They constitute the essential basis for the development of individual character. Civil rights are merely the minimum of opportunity necessary for the giving effect to the inherent

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moral worth of human personality. "This", says Mazzini[54], "at all events you must have—this modicum of immunity from aggression, from plunder, from slander, and so forth. More you may acquire: that will depend on your fortunes in life. But this at all events must be yours—if your life is not to be wrecked on a perpetual and exasperating contradiction between the inward spirit of worth, that prompts to act, and the outward accidents of circumstance which deny you opportunity." The broad constructive program of social justice legislation, which is enlisting at present the best efforts of reformers, and appealing with compelling force to the minds and the consciences of the entire nation, rests in fundamental analysis upon the recognition of the moral worth of the individual human being.

But this view is not content to rest with the acquisition of civil rights for the individual. It insists upon approaching the question of political rights, and especially the suffrage, from the standpoint of individual moral worth. The point of approach of the functional school is governmental efficiency; they deem the criterion of efficiency a sufficient basis upon which to determine all questions connected with the suffrage, as all other questions of governmental organization. To this the ethical school does not assent. "Political equality", MacCunn declares,[55] "follows from the same ultimate ideas that justify equality before the Law. . . . . The right to vote can alone open up to its possesssor that sphere of public activity, which cannot be closed on him who is fit for it without contracting his life and stunting his development. We cannot respect men for the moral worth that is in them, and yet think it a final and satisfactory state of things that they should spend themselves wholly on interests that never go beyond the range of private lives." With the possible exception of religion, he asserts, "there is no means to be named beside political rights, whereby the wider interests of life may be made a vitalizing influence throughout the rank and file of democracy." "A vote, just like any civil right, is simply one more opportunity, one more instrument, whereby the potential moral worth of the man becomes the realized and practical worth of the enfranchised citizen." "Give us votes. . . . . in order that we may make men of ourselves in that larger scene that lies open to the life of active citizenship." "The ballot, indeed," says Dole,[56] "is only a piece

[54] *"Duties of Man," Life and Writings*, iv, ch. i, quoted by MacCunn. *Ethics of Citizenship*, pp. 10, 11.

[55] *Ethics of Citizenship*, p. 13, 14.

[56] *Spirit of Democracy*, pp. 104, 50.

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of machinery. It is a method for the expression of men's manhood. Its use is not itself a natural right. The natural right is that man shall express himself in some valid form touching the interests which effect him." And again he asserts: "The mere form of asking a man's advice or opinion about the institutions to which he is subject tends to elevate his self-respect and to make him content with the working of those institutions. The practice of democracy becomes a daily discipline in good-will."

There is no doubt that this ethical conception of the suffrage played some, though certainly not the controlling, part in the movement which secured the enfranchisement of the negroes. It has played a much more important rôle in American colonial policy. It is quite impossible to explain or justify the establishment of representative institutions in the Phillippine Islands and in Porto Rico, and the grant of the suffrage to large sections of the people of those dependencies, on any ground of governmental efficiency. This was a new departure in colonial policy and was severely criticized by exponents of administrative efficiency. The two ideals of administrative efficiency and the development of the capacity for self-government, which is equivalent to the realization of moral worth, are incompatible. In forsaking the former ideal for the latter, the United States struck a higher note of political idealism than had ever before been reached. In the British Indian councils act of 1909, the English government consciously permitted this dynamic idea to also effect, though still in a minor degree, British colonial policy. Is it a hazardous prediction that this ethical theory of the suffrage will in the future fundamentally modify the doctrine that voting is nothing more than a governmental function?

The five theories of the suffrage, whose history and general import we have sketched, all continue to influence and affect our ideas, our political discussions, our proposals of reform and our actual legislation concerning the electorate. Our theory of the suffrage is a conglomerate of them all. Tangled and confused, they offer no secure or satisfactory explanation of what we are doing or have done in this important field of public law. They afford an utterly inadequate criterion by which to judge proposed innovations. They do not in their present form constitute such a constructive agency for political institutions as it is the duty of political science to supply.

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GOOD GOVERNMENT AND THE SUFFRAGE

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The cynic's retort to the advocate of good government is "Your government is as good as you make it; why, therefore, fret yourself with dreams you have failed to realize!" The retort is easily answered. "Good" means better, and "you" looks as far into the past as good does into the future. Such degree of betterment in government as we enjoy today is not due alone to the desires or activities of the present generation, but to the cumulated efforts of all, past and present, who have contributed to the enlightenment of mankind in the field of political science and in the art of governing. Likewise what we of this generation may think or do will bear fruit, some today and some long after our generation has passed away. The vision of today becomes the reality of tomorrow. If our cynical friend demands proof, point him to the history of men and institutions. If he dwells upon the accounts of evil doing, personal and public, with which the daily press is filled, bid him contrast, for example, the cities of the twentieth century with those of the eighteenth, marking especially the change in public sentiment in England since 1835, in the United States since 1880, and take courage.

With this thought for my justification, I venture to ask your consideration of some reflections concerning good government and the suffrage and their relation to the immediate future. The completion of the phase through which we are passing is near at hand, but the present generation is not likely to witness the full development of the next phase. Under it government promises to be better adapted to meet the needs of men than any which has heretofore existed.

Without attempting to find a new term for the present political era, which we call democratic, I would describe it as characteristically, though not completely nor in every instance, destructive. For more than a hundred years we have been renovating the structure of government and reorganizing the political forces. There have been much noise and confusion and some tearing down and carting away of good

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material; but, on the whole, the work has been well done and it has been necessary. The next phase will be constructive. The precise form which government will take is not important, nor need we concern ourselves with details of organization further than to note certain departures from the present type. These departures are constructive in character. They surprise us only because, being out of harmony with a destructive age, they nevertheless work well. Again, with the imperfections of the next phase we shall have little to do. It is sufficient to observe in passing that the age of constructive governmental development will, like the present, yield to another in course of time. Each generation is called upon to look to the next and no further; to seek to make its institutions better, not to know the ultimate best.

In the work of renovation, the ballot has been more relied upon than any other device for the removal of governmental rubbish. The extension of the suffrage from the few to the many has been synchronous with the marvellous development of the past hundred years, and seems to have been a necessary as well as an inseparable incident of the growth of the nations of western Europe and America. The ballot is well adapted also to placing good political material in position; but its functions, though important, are few and there are other instruments and forces which will be called into use as we pass into the great constructive era of political history.

If this conclusion is correct, it would seem to follow that we are not now called upon to extend its use further. Nevertheless, I think it both futile and foolish to attempt to prevent the ultimate extension of the suffrage to all citizens, excepting only aliens, minors, and those deprived of their liberty, or found personally incompetent by due process of law. What then! Good government will not have gone to smash. The famous Reform Coach, depicted as dashing at top speed, without break, down the tortuous hill of popular suffrage, will have arrived at the bottom. No one will have been much hurt. Some bruises will have been sustained, no doubt, and some estimable gentlemen inside considerably shaken up, but everybody will be quite able to continue the journey.

What will happen when everyone has the right to vote will not differ in any material respect from what has happened both in connection with this and other movements. Having at last secured to themselves the right, they will soon cease to regard it as of more than secondary importance. That which most people desire is the right to do or to be

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or to have, not the accompanying responsibility. Give them the right and the moment they come in sight of the resulting obligation they shrink from exercising it, except when the necessity actually arises. In other words, if we are all permitted to vote we will turn our attention to the really vital business of forming sound public opinion.

A wise mother once cured a restive boy of a practice dangerous to travelers by relying upon this principle of human nature. "My son," she said, "I have told you many times not to put your head out of the window. I shall say no more about it. But remember this. It is your head and if it is knocked off it will be your fault, not mine." The small boy looked grieved. The responsibility was more than he bargained for, but during the rest of the journey he observed the salutary custom of cautious travelers.

May we not safely rely upon human nature in this matter as in others?

But before we proceed further, something should be said in justification of the statement that it is both futile and foolish to attempt to defeat the further extension of the suffrage.

First, as to the futility of such an attempt: It is folly, some say, to proceed further in the extension of the suffrage. It should be limited rather than extended. But it is vain to talk of folly unless what is happening can be prevented. We (whoever *we* may mean) are not giving the people anything. To be sure, legislatures from time to time pass laws, but in cases of this kind the legislatures merely register the popular will. The people have taken the right and they will continue to do so—right or privilege, whichever you choose to call it—and the "we" who talk about giving and granting cannot prevent it. The time to have talked of giving or withholding is past. The time to have made effective protest was during the younger Pitt's ministry, when Charles Grey presented the petition of the Friends of the People in parliament and when, on this side of the water, the young republic was engaged in its first struggle for existence. It was already too late when, thirty-nine years later, Earl Grey forced the unwilling Lords to pass the first reform bill, and when in America we were gathering the shrivelled fruit of the rotation in office theory of government. It is worthy of note in passing, for the incident marks the inevitableness of the movement, that among the listening crowd in the gallery of the house of lords on that memorable October night in 1831 was the youthful Gladstone, then wholly conservative, attending his first parliamentary debate, but destined to become the author of the third great reform bill in 1884.

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The last stage of the suffrage movement is now well on its way. From the beginning the object sought has been definite and simple, within the comprehension of everybody. From the standpoint of the individual it is certainly just and, on the whole, advantageous. Finally, the movement is world-wide. How, then, is it reasonably possible to doubt the outcome?

Second, as to the folly of attempting to prevent the further extension of the suffrage: In spite of the logic of events, there are those who insist (though I suspect with more hope than confidence) that universal suffrage is not inevitable. We can limit the vote, they say. It is not too late and we ought to begin by refusing it to women, both for their sakes and in the interests of good government. These base their argument upon the hypothesis that the suffrage movement was not a necessary incident to political developments of the nineteenth century, and assert that, in relying upon this device, the advocates of democratic government blundered. They foresee an end of progress if universal suffrage is actually brought in. Having followed a false channel, the ship will have foundered on the shoals of democracy. They are persuaded of the soundness of this conclusion because, as they assert, the people having grasped a right were never known to give up anything, and, once armed with the right to vote, restrictions of any sort will be impossible. But this assertion is not supported by the facts. Do our streets bristle with bayonets and men go about armed to the teeth now that the right of the people to keep and bear arms is established? The grant of right of assembly did not develop an inordinate desire for public gatherings, and freedom of speech has not resulted in the cultivation of the art of slander. Libel and slander, riot and murder are still much too frequent, but we are far freer from them now than when people were denied the right to meet and speak freely and to go armed. So long as these rights were withheld, the people were ready to fight and did fight to the death to secure them. Once in possession, they went about their several occupations leaving it to the selected few to assemble, to do the public speaking and the fighting.

Or take a more suggestive instance, the commission form of government and the short ballot. In localities where these have been instituted the people formerly had the right to elect every public official from the mayor to the least significant administrative officer, but they have chosen to limit the exercise of their power and call in the expert.

Hence the folly of attempting to defeat the further extension of the

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suffrage, when if it is allowed to run its course, we shall be relieved of much fruitless discussion and the way will be opened for the next, the constructive stage of democratic government.

I have said that the extension of the suffrage during the nineteenth century seems to have been a necessary incident of the growth of nations or in the western world. Is this assumption well founded? A careful reading of the early writers reveals few exponents of a consistent belief in universal suffrage. That the center of political gravity, slowly working its way down from the king, through the hereditary classes to commoners, must at last respond to the physical law and be found in the midst of the whole mass was the belief of the more radical writers; but that this should be determined merely by counting the number of heads is to misconstrue entirely their meaning. It is true that the masses in England, unaccustomed to dealing with political questions, joined the agitators for the reform of parliamentary representation under the erroneous impression that more votes meant more bread. They did not perceive that their distress was due primarily to economic causes and hence were sadly disappointed over the results of the act of 1832. The real relief that followed the repeal of the corn laws did not dispel their illusion. Giving men the right to vote for members of parliament was such a simple remedy. The idea was so easily grasped compared with the perplexing arguments advanced by the economists. Nevertheless the masses were relieved by the legislation of 1846 rather than by that of 1832. The reform bills were purely political measures of little use to bread-winners but of immense service in the battle between parliamentary forces contending for supremacy. The victory lay with the lower house and consisted in relocating the center of political power, thenceforth and until the beginning of the present century to rest secure in the house of commons. It is unnecessary to review the situation in the United States. It is, however, necessary to point out, in spite of much expository writing and campaigning, that the result is not manhood suffrage in actual fact, either here or in England. Having secured the right to vote, men have neglected or refused to assume the full measure of their responsibility. It is not enough to attend at the polls and deposit our ballots. We must see to it that our votes really count. In other words, we have not yet had real experience of manhood suffrage, to say nothing of universal suffrage. Consequently, the completion of the present movement involves not merely an extension of the suffrage to women but the dethronement of the political boss. To accomplish

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this task much more than a political campaign is necessary. To find the man higher up, to limit the now dominating influence of those who have been forced to protect themselves and their concerns against political pirates, not to mention those who bring sinister influences to bear in order to secure special advantages, all of this is part of the destructive process. To stop there, to assume that this is more than a preliminary step is to sweep and garnish the house and go away and leave it. The spirits who will take up their abodes there will be worse than the first.

But I am not now concerned with analyzing the present political situation nor in framing a program of action for the remainder of the era of renovation. I have pointed to the familiar facts of government by political party machines merely to show that we have had no real experience of manhood suffrage and to repel the possible suggestion that I am throwing the onus of political neglect upon the women, as if they only will shrink from taking responsibility when they share the suffrage equally with the men.

Returning to the contrast presented by the results attending the enactment of the first reform bill and the bill to repeal the corn laws, allow me to narrow the field of inquiry to improvements in municipal government since the completion of the first third of the last century, for it is in this field that those experiments have been tried which foreshadow what may be and which I believe will be characteristic of the constructive era now opening before us. The industrial developments of the last seventy-five years have so profoundly affected western Europe and America that it is impossible to say in many instances what is cause and what effect, or to say what would have been the result of such a movement as the democratization of our political institutions had the industrial progress been lacking. I think it reasonable, however, to believe that municipal changes like those which took place in England in 1835 are due more to a change of view by statesmen in regard to the duty of public officials and their relation to the whole body of the electorate than to any impulse which arose from the extension of the suffrage. The spirit of reform awakened by the passage of the act of 1832 undoubtedly played its part in the parliamentary investigation of 1833 and led up to the passage of the act of 1835. But it was not the controlling nor even the moving force. The same is true of what took place in Prussia prior to the passage of the municipal code of 1853 and in France leading up to the adoption of the changes affecting municipal government in 1884.

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The change for the better which has taken place in the United States in the government of our cities beginning with about the year 1880, and especially since the beginning of the present century, has been due in large part to an awakened civic conscience and sense of obligation on the part of our public men, though here the movement has been accentuated by the efforts of municipal reformers not in public office to a greater extent than would have been normal for continental cities, in view of the relation of those cities to the central authorities.

Still one ought not to minimize the direct influence of the exercise of the suffrage both as it has been extended by legal enactment and as it has been more completely exercised by a successful attack upon machine politics. I am merely saying that this of itself is not sufficient to account for the vast change and the increasing rate of speed with which we are developing a better and more efficient type of municipal government. If this improvement were really due to the extension of the suffrage as a cause, then clearly we ought to find that where the most improvement has taken place the largest number of citizens have actually taken part in the selection of officials and in determining the public policy of the city. The investigations which have been carried on during the last ten years by students of political science, as well as by those versed in the practical art of governing municipalities, furnish us with abundant data for a comparison of cities not only in our own country but throughout western Europe. What strikes me as most extraordinary in tracing the developments of municipal governments in these countries is that the results do not accord with our preconceived notions of what ought to occur if the right to vote is in any real sense a guarantee of good government. Take, for example, Washington and any other American city. Compare with these the situation in Prussia and in England. In all of our American cities except Washington the right to participate in the affairs of the city, so far as the selection of public officials is concerned, is legally secure. I say nothing in this connection of the practical diminution of popular power because of the presence of organized party machines. In Washington, on the other hand, no resident has any immediate legal control whatsoever over the appointment of those who make and execute the laws of the city. Washington is the most autocratically governed city in the world, as has frequently been pointed out. On the other hand, so far as the provisions of the statutes are concerned, our other American cities are the most democratically governed. But what is the truth as to the actual government of the city of Washington? The

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people are not without a voice and a very potent voice in its affairs. The city is covered by organizations of citizens, each acting within its own district, each officered and controlled by residents actively interested in the welfare of their neighborhood and informed as to local needs. Each of these citizen organizations is quite as active as many city councils. If a bill affecting the interests of the District of Columbia is pending before a committee of congress, representatives from these district organizations appear to argue the case. If the commissioners have in hand a public improvement which affects particularly any locality, the organizations of that locality immediately become active and alert. Appeals are constantly made by these bodies to the several executive departments of the national government charged with the execution of laws affecting the city of Washington. No one who has come into close touch with the situation will fail to perceive the immense influence, amounting to the exercise of positive power, of these organizations composed of citizens who, under the law, are given no political rights whatsoever in the premises.

I have mentioned the commission form of government. I presume it must have occured to all students of municipal government that this system, which has now spread to more than two hundred and fifty cities of the country, is not unlike the form of city government found in England. There is the small body of citizens vested by the people of the city with fairly complete powers of government. This council of citizens becomes the policy-determining body, acting in that respect as the immediate agents of the people. Its members are heads of the several administrative departments of the city government. The actual work of each department is, however, committed to officers more or less permanent and more or less qualified as experts. I presume that to any American the most striking feature of English municipal government is the existence of a staff of permanent officials, chosen entirely without respect to political affiliations. We have not yet become reconciled to the thought of advertising for town clerks and city engineers but I suspect the time is not far distant when we shall recognize the wisdom of choosing the non-political members of our municipal administrative force with sole reference to their previous training and present qualifications regardless of whether they reside in our locality or not, and as regardless of their political affiliations as we are of the politics of those we employ in our business enterprises. But all of this is an anomaly if the right to vote and to choose directly our political officials is a necessary incident of democratic government.

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The superiority of the government of Prussian cities is generally acknowledged. No one, of course, cites Prussia as an instance of democratic government, nor will the Prussian cities be cited to prove either the failure or success of democratic institutions. Usually after paying our tribute of admiration and respect for German municipal arrangements, we dismiss the subject with the statement that this system, existing under monarchical institutions, supported by and dependant upon the strong hand of a highly centralized government, cannot, of course, be adapted to our democratic needs. Granting that this is so, we may nevertheless learn much that is important to the forward view by noting certain elements which account for the admirable results observable in German cities. In the first place, there is the three-class system of voting. Substantially as many men are entitled to vote in a Prussian city as may vote in any city in the United States, but you will recall the fact that under this system the preponderance of influence lies with those who contribute most largely to the payment of taxes. As Professor Munro observes in his admirable account of the system:

> The Prussian electoral system is based upon the representation of interests rather than of numbers; and the amount of interest which any citizen possesses in the governance of the city is gauged by the amount of taxes he pays.[1]

The three-class system, resulting as it does in shifting the political power from the many to the few, accomplishes in a regular and legal way that which is brought about by indirection under our system of party government. This does not prove its soundness, but we may note in passing that it is one of the many contrasts between our ways and the continental ways of doing things. We make a pretence of democratic government while tolerating political abuses, the very opposite of democratic. In Prussia there is at any rate an avowed purpose to keep the political power in the hands of a few while allowing a voice to all.

But the three-class system is not the most interesting part of Prussian municipal government nor is it an essential part of their scheme. Throughout the whole German system, in almost every department of it, certainly in all administrative departments in which bodies of men coöperate, two elements are invariably found, the expert profes-

[1] W. B. Munro, *The Government of European Cities*, p. 132.

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sional element working alongside of the non-professional citizen element. The great stroke of genius here is traceable to Baron Stein and his associates.[2] To secure the services of the expert in matters of administration, and at the same time to guard against the creation of a dominant and dominating bureaucracy by placing at his side, and in equal actual authority with him, a citizen familiar with the needs of his locality and with the non-political affairs of his city is to do in a much more direct and efficient manner that which is accomplished in England by the employment of permanent officials or in the city of Washington through the influence of citizen bodies appearing before the legally constituted officials. It is not sufficient to secure the services of experts and citizens by placing the one over the other or by attempting coöperation between the two sets of men organized into separate bodies. The best way is to bring them together in one body, separating neither the powers, the responsibilities, nor the honors. By this means, each may learn to respect the opinion and be guided by the influence of the other. This system is, so to speak, held in place by the strong hand of a central power which pervades the whole Prussian government. I acknowledge the difficulty of adapting it to democratic institutions, but this is true only because, as a people, we have not yet cultivated that attitude of mind toward government in its relation to popular rights which I believe to be as inevitable as the completion of the present movement toward universal suffrage. When we have come to this new point of view, we shall see the wisdom of effecting a combination like that of the German cities, instead of relying upon our present clumsy and wholly inefficient method, which secures representation of local needs in a certain few matters to the sacrifice of those broader local needs which affect many localities and which are understood only by those especially trained, and to the further sacrifice of anything like a broad-gauged municipal policy. Under the German system, the chief central administrative body has the advice of many deputations or commissions, each like itself composed of experts and citizens, while the several localities are represented not by one spokesman but by many, each especially qualified to represent the local mind concerning the particular need for which each has been chosen as a citizen to speak. The resident of a section of a Prussian city chosen to sit with experts in a deputation appointed to advise concerning poor relief for

[2] J. R. Seeley, *Life and Times of Stein.*

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example will be able to speak with authority upon that subject, although he may be wholly incapable of advising wisely concerning any other local need. The advice and counsel of this deputation of experts and citizens is passed on to the next higher deputation and so on up until at last it reaches the administrative body clothed with power to act. Into the hands of this central body come at last all of the information and the advice necessary for the comprehensive management of the complicated affairs of a great city. This cannot be secured by the mere exercise of the suffrage.

The increasing complexity of political conditions, the very vastness of the problems confronting us, demands the presence of the expert if government is to be in any comprehensive sense good. But the expert must receive both the recognition and the compensation commensurate with his position; otherwise he will not respond to the call. Native power, well trained, devoting itself to business pursuits acquires wealth. If it devotes itself to a professional calling it achieves distinction as an expert. The one is in itself as honorable as the other. Therefore, neither should receive recognition nor be placed in authority above the other. Until now suspicion and intolerance have deprived us of the service of the expert. We view with suspicion those who possess what we lack, whether it be political power or private wealth, and possessing the one we become intolerant of those who possess the other. As the constructive age advances the services of the expert will be more and more relied upon, and if we wisely take counsel of what England has done and especially of Prussia's experiment in bringing about effective coöperation on an equal footing between experts and men of affairs, we shall go far toward wiping out these hindrances to good government. One may speak with assurance here; the forecast is based upon experience. The success of the experiments to which I have alluded may be accounted for by that which grows out of responsibility. Responsibility which cannot be shifted develops caution, a tendency to seek advice and a readiness to coöperate, incompatible with suspicion and intolerance.

The constructive problems of government lie directly ahead of us. We cannot do effective work upon them until the minds of the great body of our countrymen are free to deal with them, and they will not feel free until we have put out of the way that which seems to most of them to be a sine qua non of progress. The right to bear arms has been settled. The right of assembly and freedom of speech have been guaranteed. These and other questions of right now recognized have

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cleared the way for constructive work. The suffrage question alone remains of those which have been classed as rights denied by statute. Why allow it longer to impede our progress?

We have something vastly more important to do than voting on election day, important as that is, namely, the creation of a sound and controlling public opinion. Without that voting cannot save us, with it voting becomes merely a convenient way of registering opinion and, at most, the method by which the people exercise their reserve powers.

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CERTAIN RETROGRESSIVE POLICIES OF THE PROGRESSIVE PARTY

BY FREDERIC J. STIMSON

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I do not wish to discuss these questions from a partisan point of view; for I am by no means opposed to all of them. But some study of the history of English legislation has made me appreciate not only the lack of novelty of these processes, but that there is a lesson to be drawn from the study of those early times, when in fact they were the usual method of making, of interpreting, and of executing, law. Our knowledge of these matters has come to us recently, mostly from the efforts of German scholars. We learn nothing from Blackstone; while even writers of the Bentham-Austin School wrote in more or less complete ignorance of the past history of Anglo-Saxon institutions, and with thought processes consciously or unconsciously based on the later Roman law. And so there is a school today, that would make the executive all powerful, not merely in the administration of government, but in declaring and executing the law; having as an object efficiency, not liberty, with institutions based on a benevolent State, not on a democratic people. Such schemes are ever attractive as a short cut to results, particularly so in this country where the best meant efforts of a central government are sometimes controlled and dissipated by the local government of the States. This, however, is a larger question; I shall henceforth confine myself to the four or five precise reforms which have been recently recommended to us.

I. INITIATIVE, REFERENDUM, AND RECALL

Taking the simplest, though not perhaps the oldest, first, the referendum, with its supposed twin brother the initiative, seems to have completely taken possession of the imagination of the American people. There is now an apparent conviction in nearly half the States of the Union that this reform in legislative process is not only a cure-all, but a new discovery. But the referendum has been practised in Massachusetts in ordinary legislation for something like two score years; the most world-famous referendum in all history is provided by our method of

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adopting state constitutions and constitutional amendments throughout the Union; the referendum in all matters of local import or application, such as laws imposing local taxes, authorizing local improvements or granting franchises at the expense of the public of certain localities, has been for many years in party platforms—and finally there is no doubt that the referendum existed among the Teutonic tribes which first occupied England, in all essential particulars precisely like the referendum recommended now; except, of course, such differences as are caused by the use of writing and printing. In the earliest development of Teutonic polity the whole tribe met to *declare* as well as to administer, the law.[1] Before the days of courts and legislatures, before the invention of representative government, the Germans, called together in universal council, voted upon the law as referred to them by a party litigant.[2] Probably this was not at first done in the abstract. The primitive mind is directed mainly on the concrete. It prefers the recall of a judicial decision to a constitutional amendment. Such referendums were, therefore, usually the result of a dispute between individuals. The party plaintiff, or, more usually, in criminal cases the party defendant—for in those days a party first executed the law and justified or tried it afterwards—would claim a certain law as part of the custom of the men of the tribe, before the whole body of free or fighting men when next the tribe met in conclave; and the primitive referendum was probably a vote of aye! signified by the clash of spears. The law thus declared, the defendant party would promise to justify, or, failing to do so, by oath of a sufficient number of compurgators, to submit to the appropriate ordeal.[3] Necessarily these referendums, though made in individual cases, fixed the law; just as a judgment of court would do today; only even more strongly, because they were made by and known to all the free members of the tribe. And there is evidence of the true referendum as we would have it today; that is to say, when a certain custom, declared abstractly to the tribal meeting, would be acclaimed as true law, if not new law, and for instance, "added to and recognized as part of the free customs of the men of Kent."[4]

It appears, therefore, that the modern referendum was in use for centuries among Teutonic tribes or in Anglo-Saxon kingdoms, beginning

[1] Freeman, *Growth of the English Constitution*, pp. 1-21.

[2] Schmid, *Gesetze der Angelsachsen*, Einleitung, Sec. 4.

[3] Jenks, *Law and Politics in the Middle Ages*, chap. 4, and summary.

[4] *Dooms of Wihtread*, Schmid, p. 15; *Laws of Ine*, ibid., p. 21; *Laws of Alfred*, ibid., p. 69.

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probably with the first development of tribal polity out of the individualism of savagery, and lasting down to the time when we begin to have records of the Saxon institutions and of the proceedings of council or courts.

Now why was it abandoned? Simply because of two things; The development of the court, and the invention or evolution of representative government; the one great political principle the Anglo-Saxon race has always been said to have invented. It is true that in so far as the courts succeeded to this function, they only declared the law as it had always existed; the notion that law was a permanent truth, venerable if not divine, being always persistent in the Teutonic mind. Nevertheless the line between stating the law and formulating new law is easily overstepped; and the courts doubtless made new laws, as had their predecessors, the general assemblies or witans. And as the courts developed, that part of law-making which really was constructive was left to "the Great Council, which soon became a representative assembly, the modern Parliament," mother of legislatures. But there was for a long time no "initiative." It is doubtful if the earliest tribal assemblies would have dared make one; and it is certain that, leaving out a few matters like the artificial importation of feudal, Roman and Church law, the early great councils, later the parliaments, rarely pretended to more than declare the law as it already existed. Some constitutional historians agree in fixing on the Statute of Laborers as the first piece of constructive legislation by parliament (1350); others put it as late as the Statute of Wills (1535); in the Great Code of Westminster First (1275), where the very word "parliament" was first used, they seem for the first time to be contemplating the possibility of what we should call *legislation*. And the word "statute," first used in 1235 in the Statute of Merton, means—"It is decreed" or "declared." The notion of new law grew in two ways: First, the desire of the Norman kings to make law an imperial decree, law in the Roman or Austinian sense; secondly, the desire of the people to restore their early Saxon law, which was conceded to them by the Norman kings in *charters*, not in *statutes*, and led to the process of law-making by petition, addressed nominally by the parliament to the crown. And parliament early became a truly representative body, if anything, more so in the thirteenth than in the eighteenth century, and the people of England were satisfied that it was so, however much it may have represented only the land owning classes. Thus disappeared the popular initiative and referendum, though new law was perhaps made in the courts.

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I hold, therefore, that the referendum has been one of our institutions in the past; that it is perfectly proper, nay useful to revive it in the present, and the only objections to it are, whether it is in all cases necessary, and the argument of inconvenience. I have not time to more than advert to the experience you are all familiar with of the States which have adopted the referendum, in the practical difficulty, expense and uncertainty of getting the proposed law, in good form, to and from the people.

The initiative is a more radical departure from representative government, and possibly a more risky experiment. It came a little later than the referendum. We may guess that there was no true initiative law-making among the Saxon tribes while they were in the forests of Germany; but we very soon find it in the records of the Saxon kingdoms in England. All the members of the kingdom did in fact assemble (to the number, it is said, of sixty thousand),[5] in some place like Salisbury Plain, and we have records of some such phrase as that already quoted that certain propositions are declared the general law and added to the customs of the kingdom. Later King Alfred draws up a code which may be in part new law, and says in effect, that with the counsel or consent of his wise men he has added it to the laws of the realm.[6] Now this initiative was, of course, abandoned when the general mass meeting of free men became the meeting of wise men—the Witenagemot, and entirely disappeared when such bodies became frankly representative, which they early did. We know that four leading men of the shire or Hundred appeared as representatives of the whole, centuries before that famous summons of John in 1213,[7] inviting representatives of the commons to that assembly which led to the Magna Carta. Simon de Montfort in 1265 added representatives from the cities and towns. The initiative, therefore, began with the first meeting conscious not merely of military but of legislative and judicial power, which ever a Teutonic people held; it has no more perfect example than the New England town meeting; and it ended in England with the perfection of representative government It commonly (but not always) arose out of a concrete matter of individual dispute; and it differs from the modern initiative being adopted in our States, only in that there was no second reference, no referendum of the law proposed by initiative to the people, because, of course, the con-

[5] Hannis-Taylor, i, 269.
[6] Schmid, *Alfred and Gutbrun's Peace*, p. 107.
[7] Hannis-Taylor, ii, 12.

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stituent body of the people was there, both to make the law and to vote upon it.

We have always had the initiative in America in constitution making. We have not hitherto, in Massachusetts at least, supposed it necessary in ordinary law-making, nor in England, for the reason that in both countries it has been possible for anybody to get a bill before the legislature by simple petition. But if, as is possible, that has ceased to be effective in both countries—in England for the reason that no bills are considered save so-called government bills, and with us, because private petitions are promptly pigeon-holed—it is both wise and proper in exceptional instances and under reasonable guarantee to have such measures brought before the people to prevent their being suffocated in legislatures otherwise controlled.

But the point I have again to make is that there is nothing in the least *new* about it; on the contrary, it is very, very old; far older than the civilization and constitution of modern England. The objections to it now are only to its machinery, and that it may tend to degrade legislatures; and in these days of quick printing and rapid and careless talking, the uncertainty in which it would plunge our law, and the insecurity we should feel as to the future, the trouble of continual disturbance, and the danger of legalized blackmailing. Then the initiative, as the States are adopting it, applies not only to laws but to the constitution; and it will be much more effective to apply it, as they are already finding out, to the latter. It is just as easy to amend the constitution while you are about it, as to propose a new law; and very much more effective and satisfactory. The result will, in a very few years, lead to an entire loss of the distinction between constitutions and statutes—that is to say, there will cease to be any constitutions, or law and constitution will be so inextricably intermingled that no lawyer will be able to answer any questions without a law-suit, and even the result of that may be changed by some form of these processes when ultimate decision is reached. We shall then be living in precisely the legal conditions in which people lived in the early Teutonic tribes, particularly, if, as I shall now go on to show, we are logically complete, and place with the people also the execution and decision of the law; and we shall be laboring under the added inconvenience of the invention of writing and printing. In those early German days we can imagine, a man might come to judgment from a general assembly of his tribe without, perhaps, very much uncertainty as to the result. He would not be confused by masses of written statutes, of constitutional amend-

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ments, or the records of what other courts or assemblies might have done. Today, unless (as has been urged) all court decisions are to be destroyed and all records of such meetings burned, such would not be the case.

Of the recall of officers, judicial or otherwise, I shall say little. Recall undoubtedly prevailed in the early Teutonic tribes as against an unpopular or unsuccessful chief in war. When officers began to be appointed by a king, he naturally would not leave the recall to his people; and, according to Stubbs, he appointed all his officers for life. When the people themselves elected their officers, as for members of legislatures, or informally chose them, as for county courts, all they would need to do was not to choose again the ones they did not like. This has been substantially the condition of things with us. The question is a concrete one in each particular case, except as to judicial officers, resting merely on the length of the elective or appointive term. There can be no logical dispute that the constituency which has power to elect has power to diselect. But as to the judges, their life tenure was the first fruit of the English revolution; and the Stuarts' misgovernment and our founders' deliberations both led to the independence of the judiciary and the fundamental American principal of separation of the powers. "A principle" (early said Francis Lieber) "it has never been endeavoured to transplant from the soil inhabited by Anglican people . . . . a thorough government of law as contradistinguished to a government of functionaries." This has been so thoroughly discussed by many, from President Taft down, that I can well afford to omit it here; only saying with Daniel Webster that the phrase in the Massachusetts constitution—"to the end that it be a government of law and not of men" and (I should add) the phrase "law of the land" in Magna Carta, are perhaps the grandest words for freedom in the world's history. A judge should be recalled by the law, and not because he executes the law.

II. RECALL OF JUDICIAL DECISIONS

Here we have come to the matter whereupon I want most earnestly to invite your consideration of history. This, indeed, is the first of these modern reforms which by any possibility may be said to embody anything new;[8] but one might well suggest that it be logically carried

[8] Even this may be doubted, "Lastly, the Witan acted as a Supreme Court of Justice, both in civil and criminal causes." Kemble, *Saxons in England*, ii. 215 (quoted in *Taswell-Langmead*, sixth edition, p. 27).

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out. And if it be, it is certainly nothing new but again something very, very old. When the first Saxon law court evolved out of the meeting of the tribe, or the leading men of the shire, or the neighbors of a hundred, we may not doubt that our ancestors thought that court a fine invention. So proud were they of it that they would not permit any litigation even before the king that had not first passed through the county court; and the probability is that having discovered this great convenience of civilization, doing away with crude methods of vengeance, ordeal or battle, the proposal to go back to a popular judgment, either on a concrete controversary or on the law controlling such a controversary, would have impressed them as the proposal of one who, having constructed a modern steamship would say "let us take the pieces apart again and put them together as a raft." Yet there may have been a time—a transition time—when the nascent courts were not so specialized, so differentiated, as to be beyond general popular control; when their decisions were subject to the approval, or at least to the reversal, of that general body of free men, who though suitors in the court, made up in those days, the Bench as well. For then all those who had to go to court, or who took the trouble to go to court, in a body judged one another. One has only to suppose that such a dispute or disagreement might arise as would incite the rest of their neighbors to a reversal of their judicial decision, and you have this modern doctrine. But this, after all, is a half-way state of things, and it is doubtful if one can now remain there, any more than they could in the fifth or sixth century. The logical and effective system is that still farther back, which prevailed for thousands of years among every Teutonic tribe of which we have any knowledge whatever—German, Saxon or Scandinavian; a system which lasted for a far greater number of centuries than the present court system and the modern notion of executing the law by government officials or others than the parties immediately concerned. A system which probably all Teutonic peoples, certainly those of which we have the earliest recorded evidence—namely, the Anglo-Saxon and Icelanders—adopted, as soon as the individualism of savagery gave place to tribal civilization; and which lasted until the development of the perfectly modern notion of executing justice by and through the State.

That is to say, law was eternal, immutable (save as modified by tribal initiative, as has been said) and known to everyone. When a man had a dispute with another he executed his own law; this was the first stage, and it lasted for thousands of years. If there was appeal to the tribe,

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or later, to something like a court, he was tried, not for executing the law himself, not for the slaying or maiming or forcible seizing of cattle, which he had committed, but for the fact whether he was *justified* in so doing; whether, in so murdering, killing or seizing the goods, he was *within his law* or an "*outlaw;*" he was tried, not for what he did, but (in a sense) for what he thought. The *motive* was tried;[9] and the law was declared; and the judgment preceded the proof of facts just as the execution, even by a court, preceded the trial; and when there grew to be a state, and something like government execution of legal judgments, it still remained true that the people in popular assembly, and later the same people, or a selection of them in courts, both declared and executed the law. I have but to remind you of all this history. The words of Schmid, Brunner, and Liebermann, Stubbs, Freeman and Professor Jenks, and of our own American scholars, amply show this. I would only quote the very first sentence of Henry Adams' *Essays on Anglo-Saxon Law*:

> The long and patient labors of German scholars seem to have now established beyond dispute the fundamental historical principle, that the entire Germanic family, in its earliest known stage of development, placed the administration of law, as it placed the political administration, in the hands of popular assemblies composed of the free, able-bodied members of the commonwealth.[10]

The recall of judicial decision, therefore, is the extension of an old principle, or the adoption, in part only, of a still older one. Why, instead of having only the recall of judicial decision—which I take it means the recall of a judgment, not of an abstract principle (in which latter case it is legislation)—why not have a popular *making* of judicial decision? Why should we stop half way? And why again, if we get to that point, should we not return to our older system of having the first execution of the law made by the individual?

It is simpler, for it does away with much of the law's delay; it is cheaper for the state; it is far more effective and expeditious for the individual. Much is to be said for it, and I am going to remind you of a few examples of its existence in modern times.

It is well known that there are large classes in all communities which live still in the last preceding sociological age; not only in their ideas and their mode of life, but in their customs—that is to say their laws. They

[9] H. C. Lea, *Superstition and Force*, p. 68.
[10] Henry Adams, *Anglo Saxon Law*, p. 1.

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understand and observe the last condition of things, not the present; just as the hunter does for sport what his ancestors did as a means of existence; just as we have farmers, and fishers, gipsies and nomads, so criminals—or what we call criminals—the underworld, the simpler world, is living under a state of law, perhaps not so considered by them, but exactly the state of law which existed in an earlier political evolution. And I am going to call your attention very earnestly to the condition of law, for it is law of a sort, and that one of the oldest if not the best sorts—which famous trials in New York and elsewhere have recently shown us is still existing in large classes of the community. I refer to the trial of the New York Gunmen, so called, the underworld generally, to a certain extent an organized class or status, and the police—they are bound in a sort of frankpledge to them and for one another. It seems that we here have an exact survival of earlier conditions.[11] When one man deems himself injured by another he executes his own law.[12] Suppose, for instance, a member of a gang or clan is betrayed to the "front" office by a fellow-member; having satisfied himself of the fact, he puts the other out of the way. As the Church used to put it in the early inquisition days, he hands him over to the secular arm; which may be his own or those of his gangsmen. Undoubtedly he has to justify that action before a court—that is to say, a convocation of the gangs. If it be shown that the man whom he "croaked" has been guilty of the unpardonable sin of going to the "front," or of taking his girl, not only his own gang; but probably the gang of the deceased will find a verdict of acquittal. Something even resembling the old Saxon Wite, or blood money—that first improvement on the law of vengeance—may be traced; as when a contribution is taken by one or both of the gangs for the widow or family of the deceased. And the only thing the underworld cannot understand is that there should be a law-suit about it—that is to say, a trial in the extraordinary and artificial procedure of the state courts, when the slayer has already had his trial in their own court. This complication appears to strike the denizens of the East Side in precisely the same way that the summons or other interference of a law court would have the early Anglo-Saxon. These people, when they come to be "the unsuccessful defendants in a criminal case" as the late

[11] See H. C. Lea, *Superstition and Force*, pp. 49, 76.

[12] *Ibid* p. 173. Lord Ashburton, for the liberals, opposed the bill depriving New Englanders of the right of appeal and trial by battle for murder, calling it "A pillar of our Constitution. It is called a remnant of barbarism and gothicism; but . . . . the whole of our Constitution is Gothic."

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Judge Hoar euphemistically entitled convicts, wear the same puzzled, honest look of the eye, that a good dog has when caught in a steel trap in the woods. They are docile, they abide the judgment without understanding it, as one who has lost in a game of hazard; and they do not know how correct historically their attitude is. They are survivals of the past age. They have their own code; they enforce it loyally; they are prepared to pay the blood-wite, and to stand the trial of their peers. Probably no more than the early Anglo-Saxon do they see the need of any state courts at all, or of any regulation of their conduct by law or ordinance. They are "good and lawful men" of a sort, and a good man's liberty should not be controlled.[12] That conception lies at the basis of English law. But if courts have got to be, they would look on the recall of judicial decision as giving them a chance to infuse judicial rulings with a broader and more human spirit. Then there is that other institution, lasting with them still—tribal or gang responsibility—what I have, by no means in metaphor, called the view of frankpledge. Anyone who has been district attorney or in a police commissioner's office, knows that this is the fact today. The members of the gangs are responsible, just as they were in early England, for their own deeds or misdeeds to one another; or even, under certain well defined circumstances, to members of a hostile gang. Not only that, but they are responsible, as they also were in early England, to the state; that is to say, the state as represented in the "front" office of the city superintendent of police; they have their wite, they surrender their outlaw. I need only to refer to the writings of the late Grover Flint and of Alfred Henry Lewis for a good description of this state of things. Now the frankpledge is a much simpler, cheaper, more expeditious and more efficient method of enforcing justice, of a sort, than is afforded by some of our courts.

But leaving New York, let us take another example: lynch law, as it prevails in the south; the unwritten law as it exists in the minds of

[13] See H. C. Lea, *Ibid*, p. 301, on the personal independence of the freeman as a distinguishing characteristic of all Teutonic institutions. "The freeman of the German forests, who sits in council with his chief, who frames the laws which both are bound to respect . . . . Corporal punishments for him were unknown . . . . .the repression of crime was by giving free scope to the vengeance of the injured party, and by providing fixed rates of composition by which he could be bought off" and "crimes were regarded solely as injuries to individuals, and the idea that society at large was interested in their discovery, punishment and prosecution, was entirely too abstract to have any influence on the legislation of so barbarous an age."

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certain distinguished advocates of man-slayers—murderer is too brutal a term—man-slaying in early English law was no crime, nor is it still, in the imaginations of men of that way of thinking. The question is not, did the man kill, but was he right in killing? That is the "unwritten law," and in all seriousness I remind you that this is not an invention of modern newspaper talk, but a hallowed English institution. It is true, we thought we had graduated from it; but many think we graduated too early; the upholders of the duello for instance. I am sure that but a word will be needed to be added on this subject. A moment's reflection will convince you that this condition of society, as exemplified in the speeches of the latest governor of South Carolina, is a perfect example of survival. Governor Blease himself intimates that if the person lynching the negro has made a mistake, he may be tried and condemned for making that mistake. No one in the England of 836 A.D. could ask for more than this. "The right of feud" notes Herbert Spencer in Table II of his *Descriptive Sociology* is "at the root of all legislation; the history of law its progressive limitation."

I am well aware that in taking what may seem to you these extreme examples as illustrations, I may seem not to be in earnest. I pray you to believe that such is not the case. In all sincerity I say that the measures and tendencies of today are only different from those of ancient days in that they are not quite complete; they shrink at the logical conclusion; and there is much to be said for this early condition of society, certainly as compared with inefficient courts or with the rule of functionaries, magistrates, boards, commissioners or other modern cadis whether elected or named by an arbitrary executive, without appeal to the law of the land. Let us therefore, without temptation to be sententious, seriously consider this latest proposal. We have approved, with reasonable limitations, both the initiative and the referendum; under circumstances the recall. And this recall of judicial decision, is, in all seriousness, the suggestion of a genius. Some leading jurists have spoken of it with enthusiasm, and a bill to carry it into our national Constitution is now pending in the national Congress. But how would it work in practice? We have it already in the abstract; that is to say, we can recall the Constitution in any clause of it which compels any judicial decision. Suppose we adopted the thing in the concrete as recommended by the Progressive party. I am well aware that they now limit it to constitutional decisions. One example will suffice, and I will select that of the so-called Bakers' case in New York,[14] for the very reason

[14] Lochner vs. New York, 198 U. S. 45.

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that I agree that that may have been a mistaken decision; that is to say the court might well have found that the trade of baking bread bore sufficient relation to the public health to be brought under the police power of the State. It is, however, to be noted, that that case was decided not by the state courts of New York under the New York constitution, but by the Supreme Courts of the United States under the fourteenth amendment of the Constitution of the United States. However inviting this point may be to those who love the argument between the centralizers and the "States' rights" party, I will leave it, for the constitutional phrase in question exists not only in the federal Constitution but in the state constitutions of all the States, and can be traced directly back to the great Chapter 39 of the Magna Carta of King Henry as translated in the famous Confirmation of Charters of Edward III, in 1354, when the phrase "due process of law" first appears. All our state constitutions as well as the federal Constitution do but paraphrase this clause. The courts were therefore in the Bakers' case applying Magna Carta itself. A man may not be deprived of his property, his liberty, his free custom, or his right to labor or trade, but by due process of law; that is to say, it must be by judgment of a court for some offense, not by an arbitrary statute, order or ordinance. The Magna Carta of Henry III put it that he may not be deprived of his "liberties or free customs." Now all that the Supreme Court held was that one of his liberties or free customs was to be able to earn his living by baking bread, and that the length of his working day could not be measured by the State.

I agree with Mr. Roosevelt in thinking that this decision was wrong. But suppose we had the recall of judicial decision and recalled it. What is to be the effect? Do we recall Chapter 39 of Magna Carta and the corresponding clauses in the New York constitution and the fourteenth amendment to the Constitution of the United States? That is a conclusion from which most of us would shrink. The fabric of Anglo-Saxon liberty depends upon Chapter 39 of Magna Carta. If we are to recall it abstractly we had better do it in the method already provided, that is to say, by formal constitutional amendment with all its safeguards. I have not had the honor of recent conversation with the distinguished inventor of this reform, but I presume that he would say "Of course no; we do not recall Chapter 39 of Magna Carta, we simply recall that court decision on the Bakers' case." Very good. Let it be so. In the exact phrase of the day, where are we lawyers at? We must bow to the voice of the people. But has their voice been "with

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one accord," as the old barons said the first time it was proposed to "change the laws of England"—that is, to change the Constitution or Magna Carta, or have they merely punched a hole in it in the particular matter of bakers? If the latter be our conclusion, does that hole make a precedent for other holes—as I saw it well put in some newspaper—are we like Rip Van Winkle, not to count this time, not to consider it a precedent for other similar holes—or are we to count this time? If the latter, will it not, as in Rip Van Winkle's case, tend to become a habit, and if so, how soon will our Constitution cease to be one of total abstinence? Let us face this conclusion squarely. Under the recall of judicial decision there would be no Constitution at all. We must not cry out at this conclusion, but take it in all gravity. There are many earnest people who consciously desire it, not only Governor Blease of South Carolina, but good citizens, even some judges.

There has always been a school which did not believe that acts of the legislature should be referable to the courts, a school which believed that the Constitution, as in England and France, is only binding upon the conscience of the legislature. I was recently interrupted in a political speech by a workman in the gallery who cried out that he did not think that the writings of men now dead should control the actions of men now living. That is a perfectly intelligible and practicable ground. I myself value the Constitution. I do not believe that it is a written document first invented in 1789, but I hold it the final and most perfect declaration of the liberty and principles of Anglo-Saxon civilization, full of all the lessons of our history, and as such not to be disregarded, and I hope, not to be done away with. But I recognize the right of others to a different way of thinking. And my sole object in this address has been, not to take sides on this great question, pro or con, but to remind you whither these progressive paths may lead us; and to emphasize the fact, not perhaps to their discredit, that they are leading us not to fields and pastures new,[15] but through paths well worn and much beaten by the struggling footsteps of our German and our English ancestors.

[15] "A knowledge of these things guards us, at any rate, from the illusion, for illusion it must be termed, that modern constitutional freedom has been established by an astounding method of retrogressive progress; that every step towards civilization has been a step backwards towards the simple wisdom of our uncultured ancestors." Dicey's *Law of the Constitution*, sixth edition, p. 17.

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SOME ASPECTS OF THE VICE-PRESIDENCY

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No one has yet given any careful attention to the vice-presidency on its historical bearings. Indeed, if one may judge by the opinions if writers who have touched upon the theme, it would seem to be hardly worth consideration. Within recent years there has been a good deal of free discussion of the vice-presidential office, chiefly, it would appear for the purpose of trying to supply the second officer of the national government with something to do. The ideal of the office as a sinecure is not only widespread but old. The office, it is said, offers nothing attractive to men of first-rate capacity. At this point, some one is sure to recall John Adams's reflection of December, 1793, when he wrote that "my country has in its wisdom contrived for me the most insignificant office that ever the invention of man contrived or his imagination conceived. And as I can do neither good nor evil, I must be borne away by others and meet the common fate."[1] It may be desirable at the outset to call attention to several other well-known opinions.

Writing not far from the middle of the last century, the elder Charles Francis Adams declared: "No high situation in the government of the United States could now be so easily lopped off without missing it as that of the vice-president. Its only consequence depends upon the contingency of a succession to the chief office."[2] According to Mr. Blaine, the vice-president's "most honorable function—that of presiding over the senate—was purely ceremonial, and carried with it no attribute of power except in those rare cases when the vote of the senate was tied—a contingency more apt," he remarks, "to embarrass than to promote his political interests."[3] In Mr. Bryce's opinion, the "Vice-President's office is ill-conceived. His only ordinary function is to act as chairman of the senate, but as he does not appoint the committees of that house, and has not even a vote (except a casting

[1] *Works*, i, 460.
[2] *Ibid.*, i, 447.
[3] *Twenty Years of Congress*, ii, 57.

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vote) in it, this function is of little moment."[4] Mr. Woodrow Wilson's judgment of the vice-president, epigrammatically expressed, is this: "His chief dignity, next to presiding over the senate, lies in the circumstance that he is awaiting the death or disability of the President. And the chief embarrassment in discussing his office is, that in explaining how little there is to be said about it one has evidently said all there is to say."[5]

These views are significant of the tone of dissatisfaction with the office which may be detected from the epoch of its creation in the latter days of the Federal Convention. Differing in minor respects, they recognize clearly two phases of the subject which it may be well at once to differentiate. First, the chief distinction of the vice-presidency lies in the fact that it is a national office, the occupant of which is (like the President) elected by the people. Its ultimate usefulness rests on a contingency—the more or less remote possibility that the vice-president may be called to fill a vacancy, however produced, in the chief magistracy. Second, even without the occurrence of a vacancy, the second officer derives some distinction from his constitutional place as chairman of our permanent second chamber, the senate. Our democratic ideal, it is true, makes us as a nation impatient of idleness in public as well as in private life. We do not care for those theatrical elements that have meant much in the English government. Hence we have been and are opposed to a mere chairmanship which has won thus far almost no power, and bears nothing more burdensome than a remote responsibility. We have always put up with an heir apprent in the person of a vice-president. But the prevailing attitude toward him is apt to find expression in the sentiment: Why have a second officer without any adequate employment? In keeping with this attitude there have been many efforts in the past on the part of public men—by no means always successful, to be sure—to avoid candidacy for the vice-presidential office. At least four men actually chosen for the vice-presidency by national conventions or national committees have hitherto declined the place.[6]

[4] *American Commonwealth* (rev. ed.), i, 300.

[5] *Congressional Government*, 13th ed., 1898, pp. 240–241.

[6] The first declination of the vice-presidency after a nomination seems to have been that of Thomas Earl of Pennsylvania, placed on the ticket of the Abolition party with James G. Birney of New York by a convention held at Warsaw, N. Y., on November 13, 1839, Earl's substitute was Francis Lemoyne, likewise of Pennsylvania. T. H. McKee, *The National Conventions and Platforms* (5th ed.,

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On the other hand, if one asks what can be done to re-adjust the position of the vice-president for the sake of increasing his usefulness in our system of government, the answer is not and never has been at all clear. Assuming that the office was originally ill-conceived, as Mr. Bryce believes, it is remarkable that some of its characteristic features have been adopted in many of our state constitutions. In more than thirty states of the Union today the second state officer, commonly known as the lieutenant-governor, chosen by popular vote, is made chairman of the senate and given only a casting vote.[7] It will be recalled that the southern statesmen of 1861, familiar with the federal Constitution as it had existed for a period of over seventy years, adopted the features of the vice-presidency exactly as they found them.[8] Moreover, there have been seven attempts to have the office of vice-president abolished by constitutional amendment between 1802 and 1873, but without success.[9]

The vice-presidency has existed, as everybody knows, for a period of upwards of one hundred and twenty-three years. Its twenty-seven occupants have come from about the same range of States east of the Mississippi River that have given us as many Presidents. Among the States of marked political importance in this range Ohio alone has not yet afforded a vice-president. Twelve states have provided us with vice-presidents; and among these New York stands first. From New York came five vice-presidents before the Civil War, and five after that epoch.

I am inclined to think that there are good reasons today for a reconsideration, even at the risk of covering old and well-trodden ground, of

1904), p. 43. The second instance, that of Silas Wright of New York, is well known. Wright's substitute was George M. Dallas of Pennsylvania who ran with J. K. Polk in 1844. *Ibid.*, p. 48. In the Utica convention of the Free-Soilers of June 22, 1848, General Henry Dodge of Wisconsin was named for the second place on the ticket with Van Buren, but subsequently declined it, and was replaced by Charles Francis Adams. *Ibid.*, p. 66. The fourth instance occurred in 1860 when Benjamin Fitzpatrick of Alabama, nominated on the first ballot by the Democratic convention at Baltimore, declined. The national committee then placed the name of Herschel V. Johnson of Tennessee on the ticket with Stephen A. Douglas. *Ibid.*, p. 108.

[7] F. J. Stimson, *The Law of the Federal and State Constitutions*, 1908, pp. 243, 244.

[8] Jefferson Davis, *The Rise and Fall of the Confederate Government*, 1881, pp. 651, 662 ff.

[9] Herman V. Ames, *Proposed Amendments to the Constitution*, 1896, pp. 70 ff., and Appendix A.

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the earlier historic materials bearing on the office of vice-president. To these materials, accordingly, I shall devote a part of this paper. In conclusion I should like to say something about one among several of the projects that have been recently discussed with a view to giving the vice-president greater responsibility and more to do.

I

The term "vice-president" does not appear in the records of the Federal Convention before September 4, 1787. Nor is there any reference before that day to the casting vote of such an officer. These two facts, however, may easily be overemphasized,[10] for as early as June 4 Benjamin Franklin drew attention to the necessity of arranging for a possible successor to the chief executive;[11] and several days later on June 9, Governor Randolph was puzzling over the same problem.[12] Hamilton proposed definitely on June 18 that on the death, resignation, or removal of "the Governour," his authority should be exercised "by the president of the senate."[13] Henceforth until early September this arrangement for a successor to the executive kept recurring in the debates as a more or less well-defined plan. With it there was coupled the view that the senate should choose its own presiding officer. In other words until a comparatively late stage of the proceedings the president of the senate, chosen by the senate, was expected to succeed the chief magistrate in case there was for any reason a vacancy.[14]

The details of executive organization proved to be very troublesome. Not until August 24, when the Convention had already shown unmistakable signs of excessive weariness, was the subject clearly faced. On that day there was no expressed dissent to a single executive officer to be known as President. Although there was no agreement as yet as to his mode of election, the idea that he was to be chosen by the national legislature had lost ground under the persistent opposition to it of such men as Madison, Wilson, and Gouverneur Morris, all advocates of the plan that the President should somehow be representative of the people. These men insisted that the President must be independent of the legislature for the sake of acting at times as a check upon it. Hence it is not surprising to find both Madison and Morris among those

[10] See, for example, Senator A. J. Beveridge's article, "The Vice-President; the Fifth Wheel in our Government," in the *Century*, December, 1909, lvii, 208 ff.

[11] Max Farrand, *The Records of the Federal Convention*, i, 102.

[12] *Ibid.*, i, 176.

[13] *Ibid.*, i, 292.

[14] *Ibid.*, ii, 146, 155, 158, 163, 165, 172, 179, 186; iii, 622, 625.

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who on August 27 voiced an objection to making the president of the senate provisional successor of the chief magistrate.[15]

The question of providing a successor to the President in case of a vacancy—the vacancy question, as it may be briefly termed—was one of those problems which confronted the committee of eleven on unfinished parts on August 31 and the days immediately following. So frequently since June 18 had the plan of making the president of the senate successor of the chief magistrate been voiced or formulated, that one must presume that the committee could not ignore it. But the vacancy question was interwoven with another far more fundamental—that of the method of election of the President. In fact, the method of election determined upon by the committee would seem to have forced into being the device of the vice-president, for that device, appearing first before the whole Convention on September 4, was finally accepted three days later, on September 7.[16] After the choice of President, the person having the greatest number of votes of the electors was to be vice-president. The whole electoral scheme, it may be said, was probably made with some reference to allowing the larger states, sure to have a majority of electors, the first office. But the minority, the smaller states, still had a fair chance to win the second office, especially if the election were carried to the house of representatives, in which case every state would have an equal, and only a single vote.

Thus it was in keeping with past suggestions that the second officer of the government, chosen quite independently of the senate, was placed over the senate as its regular presiding officer, although there appeared to be in this arrangement some commingling of executive and legislative function. The vice-president was not, however, to be a member of the senate. In the matter of a balanced vote in that body—a contingency depending on circumstances and quite indeterminable—he was given the right of a casting ballot, for the sake doubtless of speeding action on senate matters. The plan was in most respects similar to that of the New York state constitution of 1777 regarding the position of lieutenant-governor.[17]

Over the office of vice-president as thus provided for, there was in the Convention no prolonged discussion. With comparative ease the arrangement gained the Convention's approval. It may help to clarify contemporary and divergent views regarding the new office, if I sepa-

[15] *Ibid.*, ii, 401 ff., 427.
[16] *Ibid.*, ii, 481, 495, 499 ff., 532, 536–538.
[17] *Charters and Constitutions*, B. P. Poore, editor; 2d ed. 1878, II, 1336. Sec.xx.

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rate the group of men who opposed the plan from the group which favored it—whether in the session of the Federal Convention, or later over a period of many months (1787–1788) in the state conventions, in pamphlets, and in newspaper miscellany. The arguments of both sides may then be briefly examined.

There were six members of the Convention who opposed the vice-presidency for various reasons: George Mason and Edmund Randolph of Virginia, Elbridge Gerry and Nathaniel Gorham of Massachusetts, Luther Martin of Maryland, and Hugh Williamson of North Carolina. They were supported later on, outside the Convention, by Richard H. Lee and James Monroe of Virginia, and George Clinton of New York. There were, by way of comparison, five advocates of the office in the Convention: James Madison of Virginia, Roger Sherman and Oliver Ellsworth of Connecticut, William R. Davie of North Carolina, and Alexander Hamilton of New York. The office was defended or approved outside the Convention by James Iredell, Governor Samuel Johnston, and Archibald Maclaine, all of North Carolina, and by Judge Thomas McKean of Pennsylvania. There were of course others with views on one or the other side. But these eighteen men, expressing themselves in ways that have been recorded, remain the chief sources from which we must judge of the contemporary opinions of the vice-presidency at the epoch of its origin.

The basic assumption of the opponents of the office was that it was unnecessary. Their chief objection to the arrangement was in having the vice-president placed over the senate as chairman. It was argued that the senate should choose its own presiding officer, for the plan of the committee, it was said, "mixed" legislative and executive functions, and was accordingly dangerous. It was Mason's conviction expressed more than once that the senate might make of the vice-president a tool. And in this connection it appeared to Monroe that foreign powers might somehow gain control of him in matters which concerned their interests in the senate. Gerry, on the other hand, feared lest a close intimacy would exist between President and vice-president—a sentiment which touched Gouverneur Morris's humorous side, calling forth from Morris the enlivening comment that the vice-president would then be the first heir apparent that ever loved his father. Even the casting vote was disapproved as likely to give special advantages on occasions to the particular state from which the vice-president might be chosen. Gorham, with discernment more apparent than real, objected that obscure men might gain the second place in the govern-

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ment. But in the series of criticisms one will search vainly for a positive or constructive suggestion as to a mode of modifying the office. The opponents of it were uncompromisingly opposed to it.

The advocates of the new office had, it must be granted, the easier task, for the vice-presidency came before the Convention stamped with the approval of the committee on unfinished parts. It was the committee's solution of the vacancy question. "The consideration which recommends it to me," said Madison on June 17, 1788, before the Virginia state convention, "is that he [i.e., the vice-president] will be the choice of the people at large." This sentiment, proclaimed in some variety of language by others such as Iredell, Hamilton, Maclaine, and Sherman, pointed out the national aspect of the office. Placing the vice-president over the senate as its chairman was admitted by Sherman, speaking before the Convention, as a means of affording occupation to the second officer. As chairman of the senate, it was urged, the vice-president should be an impartial officer so far as he had anything to do in that body, for he would represent the states as a whole. And there was pronounced approval of the casting vote on occasions as a very proper mode of getting business in the senate done at critical times. No advocate seems to have thought that there would be any close intimacy between President and vice-president. At any rate no one but Morris in an amused mood referred to the matter. As the most succinct statement to be found by an advocate, I quote from Hamilton's essay in *The Federalist* of March 12, 1788, as follows:

> The appointment of an extraordinary person as vice-president has been objected to as superfluous, if not mischievous. It has been alleged that it would have been preferable to have authorized the senate to elect out of their own body an officer answering that description. But two considerations seem to justify the ideas of the Convention in this respect. One is that, to secure at all times the possibility of a definite resolution of the body, it is necessary that the President should have only a casting vote. And to take the senator of any State from his seat as senator, to place him in that of president of the senate, would be to exchange, in regard to the State from which he came, a constant for a contingent vote. The other consideration is that, as the vice-president may occasionally become a substitute for the President . . . . . all the reasons which recommend the mode of election prescribed for the one apply with great if not with equal force to the manner of appointing the other . . . . .[18]

[18] I have not reckoned among the group of opponents of the Vice Presidency Rev. David Caldwell of North Carolina, chiefly because his attitude, though hos-

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There can be no doubt that the advocates of the vice-presidential office had the better of the argument at the close of the theoretical stage of the subject, in other words, before the new government was set in motion. The vacancy problem could be solved, they were convinced, only by the device of a second officer elected as the President was, and certain (like the President) to make a nation-wide appeal. That there would need to be some change in the electoral process, such as was introduced in 1804 by the Twelfth Amendment, was not foreseen, for the significance of parties in the mechanism of the national government was only clearly discerned after the choice of Jefferson as vice-president with John Adams in the election of 1796, and still further emphasized by the political situation of 1800–1801. By this amendment, it will be recalled, a designating or discriminating principle was introduced into the Constitution: candidates for President and vice-president were thereafter to be voted for on separate ballots. Choice was to prevail where chance had previously existed. The mode of election became smoother and more efficient; but, as Mr. Henry Adams has pointed out, the tendency of the amendment was to exaggerate the importance of the Presidency and at the same time to lower the dignity of the position of the second officer.[19] With remarkable discernment, it was seen by a few men at that time that the vice-presidency might become a market-

tile, was one of inquiry and of no special moment. It may be useful to list the materials, not heretofore directly referred to in footnotes, bearing on the office (1787-1788):

Farrand's *Records:* ii, 545, 552, 567, 573 ff., 592, 597, 598, 600, 633, 635, 636, 639, iii, 136, 217 (Luther Martin's comment in "Genuine Information."), 343-344 (W. R. Davie's comment in the N. C. Convention).

State Conventions: (1) Pennsylvania: McKean's comments, December 11, 1787. Elliot, *Debates*, ii, 531, 538. (2) Virginia: Mason's, Madison's, and Monroe's comments, June 17-18, 1788. Elliot, *Debates*, iii, 486 ff., 495, 498. (3) North Carolina: Caldwell's, Maclaine's, Governor Johnston's, Davie's, and Iredell's comments. July 24, 1788. Elliot, *Debates*, iv, 26 ff., 42-43, 107. Incidentally the office or officer was mentioned before the S. C. Legislature on January 17, 1788. Elliot, *Debates*, iv, 281; and also in the Massachusetts Convention on January 23 and February 1, 1788. Elliot, *Debates*, ii, 85, 86, 127.

Other references are: Mason's "Objections." in P. L. Ford's *Pamphlets*, p. 330. Iredell's "Answer" of January 8, 1788. *Ibid.*, pp. 349-350. R. H. Lee's comments on October 10 and 12, 1787. *Ibid.*, pp. 298, 310. G. Clinton, November 8, 1787. P. L. Ford's *Essays*, pp. 262-263. O. Ellsworth, December 3, 1788. *Ibid.*, p. 158. R. Sherman, December 25, 1788. *Ibid.*, p. 240. A. Hamilton in P. L. Ford's *The Federalist*, p. 456.

[19] *History of the United States*, ii, 133.

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able office. "The question will not be asked, is he capable? is he honest? But can he, by his name, by his connexions, by his wealth, by his local situation, by his influence, or his intrigues, best promote the election of a President?"[20] The change made way for the enforcement of party wishes, first through the congressional caucus, and then through the mode of the national convention—the mode which has been conspicuous ever since it was adopted in the Jacksonian epoch.

The chairmanship of the senate, the position determined upon in 1787 for the vice-president, was the result of secondary considerations. This arrangement afforded the chief ground for objections to the office—objections, however, which impress us today as largely unreal. The very thought of the vice-president as a tool of the senate, or as an officer likely to influence that body in favor of a foreign power as against the national interest, is quite enough to raise a smile. The officer was really placed at the senate's mercy; and the quality of that mercy hitherto has been distinctly strained. John Adams bemoaned his impotence in extravagant language; and other vice-presidents would probably occasionally have done so, had they had Adams's gift of recording their sentiments. The suggestion of undue intimacy, on the other hand, between President and vice-president may be briefly dismissed. For a time Washington and Adams kept up the practice of some personal intercourse. Jefferson, however, announced soon after taking up his task as vice-president that he regarded the office as constitutionally limited to legislative functions.[21] This assumption, although unacknowledged, has probably guided most of his successors. But Jackson and Van Buren were warm and admiring personal friends. Polk and Dallas consulted frequently and informally together, as every reader of Polk's *Diary* knows, on points involving national and party policies. And the same sort of useful intercourse certainly existed between McKinley and Hobart until Hobart's death in office on November 21, 1899. These are the only examples thus far of that "dangerous" intimacy which Gerry thought that he foresaw in 1787.

The subject of the casting vote of the vice-presidents has, so far as I am aware, never received any systematic attention. This important constitutional privilege has been exercised many times from the beginning of the office down to the present day. About this matter I am not yet ready to venture many conclusions. This vote has, however, fre-

[20] Senator Samuel White of Delaware in the Senate, December 2, 1803. *Annals of Congress* (1803-1804), 8 Cong., 1 sess., p. 144.

[21] May 13, 1797. *Writings*, ed. P. L. Ford, vii, 120.

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quently been used to quicken legislation in accordance with the views of its advocates. Moreover it has had a telling influence on several matters of large legislative consequence, beginning with John Adams's first vote cast in the face of a balanced senate, by means of which he sustained, on July 18, 1789, the President's power of removal.[22] On April 28, 1794, Adams killed the bill to suspend British imports—a legislative measure that would probably have rendered the mission of John Jay abortive and might have led us directly into war.[23] On February 20, 1811, Vice-President Clinton was responsible for ending the career of the first United States Bank—a blow to one of the greatest of Federalist measures.[24] It was Calhoun's casting ballot in the senate in January, 1832, against the nomination of Van Buren as minister to England that brought Van Buren back to this country and resulted in assuring him his party's nomination to the vice-presidency.[25] On July 28, 1846, by his casting vote Vice-President Dallas was responsible for placing the tariff act of that year on the statute book.[26] These are a few among many instances of the power which vice-presidents have exerted at critical times for what they believed to be the national or party welfare. The casting ballot has been used by twenty-one out of the twenty-seven vice-presidents from 1789 to the summer of 1911. The six vice-presidents notable for not having used this power were: Tyler, W. R. King,[27] Andrew Johnson, Hendricks, Roosevelt and Fairbanks—obviously (except in the single instance of Fairbanks) for the reason that they were in the senate for very short periods. Altogether there are upwards of 150 casting votes to be found in the senate records as thus far printed.

The moment we turn to contemplate the personnel of the vice-presidency—the series of twenty-seven men (four of whom are alive today)—we are confronted by the failure of the founders in their plan of placing the vice-president as well as the President outside the play of party spirit, and of freeing both these officers from democratic dictation. In other words one of the greatest tasks of government, the choice of men, has fallen into the controlling power of party organizations through circumstances unforeseen in 1787. The President has been forced to

[22] *Journal of the Senate*, i, 42.
[23] *Journal of the Senate*, ii, 70. Cp. J. Adams's *Works*, i, 457.
[24] *Journal*, iv, 578.
[25] *Executive Journal of the Senate*, iv, 199, 203.
[26] *Journal*, 29 Cong., 1 sess., 1845–1847, pp. 452, 453.
[27] W. R. King died on April 18, 1853, before he took the chair.

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the position of a party leader by customary regulations characteristic of the national convention and having the strength of law. The vice-president, chosen in the same way, must likewise be a party man, and is under bond to sustain the party's principles which are supposed to make for national welfare. It would be a bold, perhaps an impossible, task to attempt to penetrate into the motives which have guided the leaders of national conventions in selecting candidates for the vice-presidency. Certainly the frenzied proceedings and records of the conventions themselves will throw little light on the problem. Except in a few instances, notably that of Van Buren in 1832,[28] the vacancy problem seems to have been lightly considered. The availability of men chosen for the second office has depended on geographical considerations, services to the party, and more or less temporary issues that, like the issue of sound money in 1896, loomed large and called for a vice-president of clear record on those issues.

It is customary to assume that the vice-presidency has sheltered a collection of mediocrities, men at any rate far below presidential dimensions. This sort of blanket criticism is not easy to disprove. It rests doubtless on sundry facts which give it partial justification. It is easy to recall the Presidents and so very easy, on the other hand, to forget the vice-presidents. There have been men of small distinction and little ability in the vice-presidency. On the other hand, it is fair to remember that the larger proportion of our vice-presidents have been men tested in high positions. Beginning with Jefferson there have been ten state governors chosen to the second national office. Four of these—Tyler, Hamlin, Andrew Johnson, and Hendricks—had also served in both the national senate and the house of representatives. Altogether, eleven vice-presidents have had careers in the senate, and fifteen in the house. Only Arthur and Hobart had never held conspicuous national offices. We shall never know just what sorts of vice-presidents Madison,[29] Jackson,[30] Polk, and Lincoln might have made. But each of these men at different times was considered for the second national office, although, as it happened, all of them occupied the first. The Presidency is after all the only satisfactory test of so-called presiden-

[28] See *Van Buren Papers*, MSS., Library of Congress. January-March, 1832, *passim*.

[29] It is not usually recalled that New York gave three of its electoral votes to Madison for vice-president in 1809.

[30] In the electoral count in 1825 Jackson received thirteen votes for vice-president.

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tial dimensions; and, as everybody knows, this test has not always been effectively met when a vice-president was suddenly called upon to take charge of the chief magistracy.

II

The idea that the vice-president has not enough to do as chairman of the senate, and that he should somehow be made more useful than he is, goes back to the very beginning of the office.[31] It has been emphasized in recent years by almost every writer who has had anything to say about the vice-presidency. The senate, it is urged, should permit their constitutional chairman to appoint committees. If the Constitution could be amended, it might then be made possible for the second officer to take part on occasions in debate like any regular member of the senate, and to vote on all questions.[32] Again, it has been proposed that congress create by statute a new department, say, a department of interstate commerce. Over this the vice-president might be placed as director. This latter plan would not, of course, deprive the vice-president of his place over the senate, but would certainly keep him busy during hours when the second chamber was not in session.[33] These proposals I shall not stop to discuss. It is enough to say that they rest substantially on the assumption that a position involving greater freedom and larger responsibilities, yielding at the same time additional official power, would tend to make the vice-presidency attractive to stronger men than hitherto have been drawn to it.

Distinguished from these and somewhat similar proposals is the plan of having the vice-president a member of the cabinet without a portfolio as one of the President's advisers. As long ago as 1896 Mr. Roosevelt, then president of the New York board of police, formulated this project incidentally in the course of an article on the vice-presidential candidates of that year. The project was re-stated by Mr. Bryan in the first number of *The Commoner* (January 23, 1901); it attracted widespread attention when, in the summer of 1908 (July 15) Mr. Bryan declared that he proposed to admit his running-mate, John W. Kern of Indiana, into his cabinet if he were elected to the Presidency in the following November. Since that time Senator Beveridge has been among those to approve the project. Commenting disapprovingly on

[31] This idea underlay some of the opposition to the office in 1787-1788. It was at times emphasized in the debates over the Twelfth Amendment in 1802-1803.

[32] T. Roosevelt in *Review of Reviews* (September, 1896), xiv, 289 ff.; Hon. Walter Clark in *Green Bag* (October, 1896), vii, 427-428; Sen. A. J. Beveridge in *Century* (December, 1909), lvii, 208 ff.

[33] Hon. W. Clark in *Green Bag* as cited above.

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the Bryan utterance of 1908, an editorial in the *New York Sun* remarked: "The expediency of making such an innovation is doubtful, and somehow we do not feel apprehensive that a similar declaration of intention will be made by Mr Taft."[34] It may be observed in this connection that President Taft, although approving in a recent utterance[35] the general plan of bringing the executive and legislative branches into closer relations by admitting the cabinet officers—the heads of the nine executive departments—to seats in both the senate and the house of representatives with the privileges of debate, has no suggestion to make as to what to do for the vice-president.

The framers of the Constitution did not overlook the possibility of including the president of the senate in a council of advisers for the chief magistrate.[36] Although they did not directly provide for such a council, they placed no word of limitation in the fundamental law which would prevent any President from calling on the vice-president for advice in case he might wish to do so. Washington took John Adams's written and oral advice on many matters; and once at least invited Adams into a cabinet council, although he himself was not present. Apparently it was Washington's idea that on the occasion of his own absence from the seat of government it was proper that the second officer, the vice-president, should take part in cabinet discussions.[37]

In later cabinet history I can discover no evidence that reveals a single instance of the vice-president in attendance at cabinet sessions. Jefferson, as I have already pointed out, viewed the second office as essentially concerned with legislative matters; and he gave his friends in 1797 who urged upon him the desirability of his taking part in executive consultations a clear-cut refusal to do so. Not until after Taylor's election to the Presidency in the autumn of 1848 is there additional evidence on the matter. It appears that Taylor, interested in imitating Washington's example and perhaps superficially acquainted with some of Washington's early executive practices,[38] conceived the notion that it had been customary to admit the vice-president to cabinet sessions. He consulted with Fillmore somewhat freely in the latter part of February, 1849, a week or so before his term began, and went so

[34] July 19, 1908.

[35] Lotos Club Speech, New York City, November 16, 1912. Printed in *The Independent*, (New York), November 21, 1912. President Taft elaborated his plan in a message to Congress of December 19, 1912. See *Congressional Record*, vol. xlix, 846 ff. It is peculiarly notable as the first instance of this project in a Presidential message.

[36] Farrand's *Records*, ii, 329, 367, 375, 376.

[37] For details, see my volume, *The President's Cabinet*, 1912, pp. 123 ff.

[38] *New York Herald*, December 26, 1848.

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far as to assign to the vice-president certain New York appointments, much to the discomfiture of Senator-elect W. H. Seward and Thurlow Weed. But he was soon informed of his blunder. On March 10, 1849, Seward could write: "The idea of the V. P. being a member of the Cabinet has expired noiselessly."[39] From that day to this there has never been an effort on the part of any President to associate the vice-president with the cabinet regularly. It is possible that instances of admitting the vice-president on occasions to a gathering of the cabinet may have occurred, and may some day appear in stray records. But it is certain that from 1789 to 1912 no custom in the matter has been established. One need only to read closely Polk's *Diary* and the *Diary of Gideon Welles* to discover that senators, army officers, and occasionally others have been informally admitted to sessions of the cabinet at odd times.

The vice-president represents no department. With his nomination to office the President has as a rule nothing whatever to do. He is not in any sense, except in the matter of salary, on a par with the heads of the executive departments. The senate has customarily limited his functions to those of a moderator, allowing him very little power. What a man so situated can accomplish, must depend on circumstances beyond control and necessarily indefinable, but also on such factors as party position, political sagacity, and personal force—all of these factors sure to affect the vice-president's capacity to guide and influence the second chamber. Could he be any more effective in his constitutional place as chairman of the senate, it may be asked, if he were recognized as a member of the cabinet? Would the senate approve or sanction such recognition? Prolonged sessions of the cabinet have occasionally been held in the past in times of national emergency. At such times the senate also may be very actively engaged over national and legislative problems. At such times, moreover, there can be little doubt that the vice-president should be in his place in the senate. It is of course quite conceivable that senate ideals on a particular issue may be essentially different from those prevailing in the cabinet, and even at odds with them. In fact, is not this effort to make the vice-president useful really misdirected? For, in the first place, it overlooks the discretionary power always hitherto allowed the President in choosing

[39] F. W. Seward, *Seward at Washington, as Senator and Secretary of State . . . . 1846-1861*, New York, 1891, p. 107. See also *Autobiography of Thurlow Weed*, ed. Harriet A. Weed, i, 586 ff.; Frederic Bancroft, *Life of William H. Seward*, 1900, i, 213-215.

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his intimate counsellors; second, it minimizes, if it does not overlook, past practices; and finally it is, I think, a plan that quite disregards the fundamental ideal of the office.

The vice-president as the second officer of the government is the guardian of the Presidency. Viewed in this light, the officer is necessary. He could not be "lopped off," for the vacancy question is always present. Out of joint as our political machinery may be, the election, if not the choice, of the vice-president—like the election of the President—has always been intended to represent the nation's wishes. Upon this fact much more than upon the chairmanship of the senate the vice-president's chief claim to dignity and distinction really rests. It is not perhaps inspiring for men to serve their country by waiting for an unexpected contingency to arise. But this sort of service is inherent in the nature of the office—it cannot be avoided. "The nature of the office," remarked Madison in the first session of the house of representatives, "will require that the vice-president shall always be in readiness to render that service which contingencies may require. . . . . If he is to be considered as the apparent successor of the President, to qualify himself the better for that office, he must withdraw from his other avocations, and direct his attention to the obtaining of a perfect knowledge of his intended business. . . . . "[40] And, with what appears today as amusing ingenuousness, Fisher Ames, speaking on the same occasion of the vice-president, said: "Through the time in which he is not particularly employed, he is supposed to be engaged in political researches for the benefit of his country. . . . . "[41] These are old-fashioned views. Possibly they are quite out-of-date. But although seldom or never expressed nowadays, they present an ideal of the vice-presidency which cannot, I believe, have been either forgotten or wholly overlooked.

The questionable methods of nomination by the national convention may have lessened to some extent the real dignity of the vice-presidency, but not the fundamental importance of the office as expressed by Madison. There can be no doubt that many circumstances within recent years have imposed upon the second officer heavy burdens in the matter of sustaining his prestige and position. His social functions alone are bound to be numerous. The well-known fact that several wealthy men within the past quarter of a century have been called to the vice-

[40] *Annals of Congress*, i, 673. July 16, 1789.
[41] *Ibid.*, i, 674.

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presidency is enough to suggest one important reform—the raising of the vice-president's salary to a grade considerably above that of the cabinet officers. Although at first, in 1789, the second officer's salary was slightly above that of the heads of departments, it has remained on a par with such salaries since 1853—slowly rising to the status of $12,000 in 1907.[42] Is it not time that this reform in salary should be introduced? Would it not be in keeping with the ideal of the second officer's importance, and help to restore the dignity of his position if he were given such a sum as (let us say) $25,000? And in this connection we may recall Madison's view once more, as he expressed it in 1789, when the salary problem was under discussion in the House: —"The idea that a man ought to be paid only in proportion to his services holds good in some cases, but not in others. It holds good in legislative business, but not in the executive or judicial departments."[43]

[42] For a table of salaries of President, vice-president and cabinet officers (1789-1909), see *The President's Cabinet*, Appendix A, p. 396.

[43] *Annals*, i, 673-674.

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THE DEMOCRATIZATION OF PARTY FINANCES

BY WALTER E. WEYL

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To democratize industry and politics, we must, among other things, democratize the political party; to democratize the political party we must among other things control its purse.

Here, as elsewhere, he who pays the piper calls the tune. Your campaign contributor may be never so public spirited your party treasurer may be never so scrupulous, and yet when the need of money is urgent, much is understood that is not written down, and much is confidently assumed that may subsequently be denied. Nor is venality, overt or veiled, the chief danger to be apprehended. What we must fear is not so much the campaign gift which buys the way to an ambassadorship or a cabinet seat, as the effect upon platforms and nominations of the anticipated need of securing funds from a few wealthy men.

The influence of great fortunes upon party councils steadily increased in this country, until it reached what was probably its high water mark in the electoral debauch of 1896. We need not trace this history in detail. For over half a century, from the days of Van Buren to those of Hanna, the party developed extensively and intensively, acquired power, viability, an intricate and effective complexity, a differentiation of structure, a variety of function—in short, it adapted itself to all the varied and changing needs of a growing political organism. All this growth and all this increase in function cost money. The party secured funds wherever it could. It was not squeamish. It did not believe in any doctrine of tainted money, and it accepted in the same charitable spirit the dollar wrung from the office-holder, the dollar of the saloon keeper, and the dollars of the man who wishes to invest in that valuable and marketable commodity, political influence.

The civil service reform movement, which made such continuous progress since the days of Arthur and Cleveland, largely moderated the hold of the politician upon the office holder, with the result that political contributions by the servants of the state, became of less relative

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importance. This deflection of funds, however, seemingly resulted in a better organized, and more successful attempt to secure money from large corporations.

During the last ten years a more or less vigorous campaign has been conducted against the great industrial and railroad combinations and especially against their influence upon legislation and administration. The wide-spread demand for the initiative, the referendum, the recall, the direct election of United States senators, and for similar measures has been largely motived by the desire to prevent great corporations from influencing politics through the corruption of executives and legislative bodies. To free the political party from a similar influence, many well conceived laws, state and federal, have been passed. Political parties have been compelled to publish all important facts concerning their finances, including the names of contributors. Corporations have been forbidden to contribute to political funds. Candidates have been restricted in the amounts that they may spend in the furtherance of their own election. Corrupt practices acts and direct nomination of candidates have in other directions loosened the hold of the great corporation upon the political party.

All this has been salutary, and year by year our worst campaign abuses are abated. Even today, however, the political parties are, during campaigns, almost entirely dependent for the bulk of their funds upon large contributors. We need not ascribe evil motives to the men who in the recent campaign contributed great sums to the Democratic, Progressive and Republican parties, and we may as freely acknowledge the probability that these gifts were as honorably received as offered. Nevertheless, the fact that the overwhelming bulk of the contributions to all the great parties came from a comparatively small number of wealthy men cannot but be fraught with danger to political probity. The more radical the party utterances, the more dangerous is any exclusive dependence upon the gifts of very wealthy men.

What is needed is to supplement the prohibitions of our recent legislation concerning political parties, with a definite, positive and sustained effort to secure financial support from a wider section of the electorate. Political campaigns have been too long run upon the model of the free circus, with the result that millions of men who would not accept a free meal or a box of cigars from a charitable neighbor, allow their most vital political prerogative—their right to vote—to be subsidized by a group of wealthy strangers. After all, the election of a President, a congressman, an alderman is the people's election. It is the

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qualified citizen's duty and privilege to vote. It is equally his duty and privilege to pay for the election at which he votes.

It has been suggested that this public contribution to campaign funds be made collectively, through the government, instead of individually. Such a plan has the advantage of facility. It merely requires a law. On the other hand, it is not educative. Moreover, such a proposal seems to involve serious drawbacks. It might well tend to strengthen the hold of a corrupt clique upon a political party, by giving such a faction the control of the governmental contribution. Such a subsidy might render the nominal leaders independent of the party membership, while giving them the wherewithal to buy adherents and silence opponents within the party.

For these reasons, we may well postpone the advocacy of the device of government contributions until we have thoroughly tested the alternative plan, the plan of small popular voluntary contributions.

There is only one political party in the United States, which has adopted this plan. The Socialist party, being composed of relatively poor men and women, naturally fell back upon a system of membership dues, a plan analogous to that of trade-unions, lodges, benefit societies, and other democratic organizations of men of approximately equal means. Nevertheless, there is no reason why the Socialists should not make a virtue of this necessity, for by means of this deomocratization of their party finances, and of their party government in general they have taken a long forward step in the political development of America.

For, it must be remembered, the probable future of American political parties will be in the direction of a more continuous functioning, and they are more likely therefore, to resemble in this respect the Socialist party than the Republican or Democratic parties of today. The political party of the future, though it will waste less, is not unlikely to spend more than hitherto. The Progressive party, for example is preparing a permanent educational campaign with organized publicity, legislative bureaus, and a progressive service, which will seek at all times to promote the measures to which the party is pledged. The American political party must come to recognize that it is better to remain alive all the year, rather than to hibernate between elections; that it is better to be awake four year in the quadrennium, 365 days in the year, than to be feverishly overactive during campaigns and a comatose thing in the intervals, a poor cold creature in a state of suspended animation, with the pulse hardly beating, and the breath of life almost extinct. In

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other words, American parties in the future will probably be more permanent, more prominent, more powerful, and with this increase in their power the need for democratization in their party government, (party referendum, initiative and recall) and for democratization in party finance will become more apparent.

Let us see what the Socialist parties, here and abroad, have already accomplished. The Socialist party in America, with a vote of 900,000 has at the present time a dues-paying membership of about 125,000. In other words, for every seven Socialist votes, there is one man or woman who pays dues month after month. There are no statistics showing the actual amount of this contribution, and an estimate is somewhat hazardous, because the monthly payments differ in different localities. It has been estimated, however, that the average dues throughout the country are about 25 cents a month, on which basis the entire revenue from this source would be over $350,000 a year, or $1,400,000 per presidential quadrennium. The supplementary party revenue from lectures, sales of literature and badges, from special small assessments, etc., is supposed to equal this revenue from dues, though of course there are no reliable estimates.

This development of a dues-paying party membership has been a matter of slow growth and infinite pains, but today there are evidences that this dues-paying membership of the Socialist party is increasing considerably faster than is the Socialist electorate. The same is true to an even greater extent of the German Social Democratic party. That party which polled 4,400,000 votes in the election of 1912, is supported by the monthly contributions of no less than 970,000 male and female members. This dues-paying membership is increasing at an enormous pace and is rapidly converting the German Social Democratic party into the most powerful as well as the best organized political party in the world.

There are many difficulties in the way of a development such as is here outlined, difficulties which I have not the time now even to enumerate. A conservative party, a party without an enthusiasm amounting almost to an obsession, will find it fruitless to appeal to the self-sacrifice of its members, and even a large radical party will not soon or easily obtain the cohesion and sustained spirit of self-sacrifice of the smaller Socialist Party. The payment of dues is extremely irksome, and the cost of collection is high. For a number of years none of the larger American political parties will be able to dispense entirely with

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the large contribution. The large contribution, however, discourages the small one.

There is, however, not only a fiscal but an educational end to be secured. It would pay a large political party to expend a hundred thousand dollars in securing an equal amount in one dollar dues, because the man follows his dollar, and the sacrifice is in itself a thing of value. The men who will pay an annual dollar or two or five are a picked corps, a body of men ready for all the services, educational and other, of which a political party is capable.

I shall not go into detail as to the best manner to inaugurate such a plan of securing a dues paying party membership, but shall mention one parallel line of party development which might make the financial strain upon the party smaller. That development is in the direction of lessening party expenses, by allowing the government to assume certain of the party functions. In the matter of advertising and in the distribution of literature, the expense might be born in part or whole by the government. The government, local, state, or national might publish what would be a combined handbook for all the parties, each party presenting its case succinctly in its own words. The educational effect of the campaign would be enormously increased by lessening the volume of dubious not to say mendacious literature, which flows from the uncontrolled presses of the political parties. The free use of the mails for such joint literature would also lessen expenses, and an enormous amount of "graft" in printing etc., would automatically be eliminated. Such an educational campaign would relieve the parties of much of their present financial strain. The cost of halls for speakers could be minimized by the free use of schools and other public buildings. In a hundred ways, illegitimate or at least unwise party expenses might be eliminated, with the result that the financial need being less, the democratization of the party finances would be brought within a measurable distance.

It seems to the author that the broad political highway in America leads to a strong and responsible party, and not to a weak and irresponsible one. To make the party strong and responsible we must not only make its means of support visible, but we must also make them, and the very life of the political party itself, dependent upon the continuous loyalty and good will of millions of party members.

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THE BELGIAN POLITICAL SITUATION

BY J. SALWYN SCHAPIRO

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The little corner of Europe, now known as the independent kingdom of Belgium, has played a rôle in history entirely out of proportion to its size and political importance. Belgium has been the cause of many wars, national and international, and on her soil the fate of Europe has often been decided. It well deserves Bonaparte's appelation "the battlefield of Europe." Because of her geographic situation, right in the midst of a group of hostile powers and because of her great economic importance, this tiny land has been the choice morsel which many nations strove to possess. Burgundy, Spain, France, Austria and Holland, each in turn, ruled the country. The prize was so great that, rather than see it in the hands of any one power, the nations of Europe agreed that none of them should possess it. In this way was born the kingdom of Belgium during the early part of the nineteenth century; a German prince, Leopold of Saxe-Coburg, was made king of the newly-born nation, and its existence was safeguarded by a guarantee of neutrality.

The successive occupation by foreign powers has left comparatively little impression upon the country. The conquerors merely sent governors and armies to collect tribute and bothered little about anything else; the various communes continued to enjoy almost complete self-government, irrespective of which flag floated over them. So strongly did the communal spirit develop among the Belgians that it is today far stronger than the national spirit; the question has often been asked, "Is there such a thing as a Belgian nationality, *une âme Belge?*" Not only is the Belgian state of recent origin (1830), but the people themselves form an antagonistic hybrid. They are divided into two mutually hostile races, whose manner of life, language, politics, religion, and ideals present sharp differences. In the north are the provinces of Flanders, Brabant, Anvers and Limburg, peopled by about four million Flemings of Teutonic stock, speaking a Dutch dialect called Flemish and living mainly by agriculture. There are no Dutch

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so Dutch as these Flemings: stout of body, of fair complexion, conservative in ideals and phlegmatic in temperament. In the south are the provinces of Hainaut, Luxembourg, Liège and Namur, inhabited by about three million Walloons, of Celtic origin, speaking French and living almost entirely by industry. In temperament and ideals, these Walloons strongly resemble the French whom they greatly admire and constantly imitate. The religion of the Dutch Flemings is Catholic in the full sense of the word; among them the church rules completely and unquestionably in every department of life. It was for religion's sake that they twice broke away from their Protestant kinsmen in Holland. Let an issue arise concerning the church and the Fleming immediately makes a rush for the altar, remarked the Brussels radical journal, *L'Express*, à propos of the recent election. On the other hand, the French Walloons, while Catholic through baptism, are that only; for they are imbued with the rabidly anti-clerical spirit of France which has taught them to regard the church as typifying the re-actionary spirit, organized; and they make war upon it unceasingly as the enemy of the ideals of modern society. The language question is another bone of contention between these two races. Officially there are two languages, French and Flemish. In the lower schools, both are taught, but in the higher institutions of learning, only French is recognized. A very strong demand is constantly being made that a Flemish university be established in Ghent, in order to give recognition to the Flemish language. The divisions between the Flemings and Walloons are so deep that, had Europe permitted, they would have split apart long ago, the Walloons going to France and the Flemings to Holland or perhaps to Germany.

The most significant fact about Belgium today is its extraordinary economic development. This little place, about one-tenth the size of England, is after Germany, England, and France, the most industrialized nation of Europe, and is far ahead of either Russia or Italy in this respect. Splendid coal mines and oil fields have given such a tremendous impulsion to manufacturing that Belgium may be described as the Pennsylvania of Europe. Southern Belgium is really one gigantic factory and presents a picture of the modern world in small compass; the very sky is made lurid by the thousands of fires that turn the wheels of industry. Along with this economic development, there came, naturally enough, great changes in the political system, so that the former battlefield has become the present social laboratory of Europe. An advanced system of social legislation, has been put into operation with many beneficent results. The idea of production and distribution in common, known as

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the coöperative movement, has had its greatest success in Belgium. One of the great problems in modern politics is how to make audible the minority of voters in any election, and Belgium has solved the problem of minority representation by introducing an excellent system of proportional representation.

During the greater part of the nineteenth century, the Liberal party, representing the middle classes, governed the country under the leadership of the celebrated statesman Frère-Orban. The high tide of Liberalism then began to ebb in Belgium as everywhere else, but unlike everywhere else, it began to flow in the direction of the conservative party which, in Belgium, is clothed in the religious garb of Catholicism. For thirty years, the Catholic party has now been in full control of the government; and it is a curious contradiction that a country which is the epitome of modern middle class civilization, the "paradise of capitalism," as Karl Marx called her, should be governed by a party representing the agrarian interests of the Flemish peasants and organized by the very soul of the Middle Ages, the Catholic church. In part this is explained by the fact that the Belgium Catholic party, unlike the Centre in Germany, is a Catholic not a distinctly clerical organization. It will do anything to advance the interests of the Catholic faith not at the expense of national well-being, and it is not ultra-montane. A former prime minister, M. Smedt de Naeyer, openly declared that his party was not a confessional one and had not pushed the interests of the church too far. The Catholic church is now awakening to the fact that history is no longer determined by lords and peasants but by capitalists and working-men, and that its attitude must change accordingly. Being conservative by instinct, it generally favors the capitalist, but being also Christian, it advocates measures for the well-being of the working classes; it has safeguarded the interests of capital by farsighted legislation in favor of industry and commerce and has protected the interests of labor by inaugurating the splendid system of social legislation now in force. The members of the left wing of the Catholic party, known as the Catholic Democrats, are continually agitating for more advanced laws in favor of the lower classes. The church has built up a remarkable network of organizations which bind its adherents from the cradle to the grave. There are Catholic political clubs, social, literary and patriotic societies; schools, coöperative societies and labor unions. All these activities have one aim: to capture the workingman, and so divert him from Socialism.

The rapid disintegration that has overtaken continental Liberalism is

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one of the most significant signs of present European politics. Crushed between the upper millstone of Conservatism and the nether millstone of Socialism, the Liberal parties have been steadily losing ground in every country. They have been saved from utter annihilation only by championing the cause of anti-clericalism. On this issue, there is a sort of *entente cordiale* between the middle class parties and the Socialists, known as the "Grossblok" in Germany, the radical "bloc" in France and the "cartel" in Belgium. In England, Liberalism has held its own through becoming radicalism. Having played their part in history by introducing constitutional government, the Liberals are now about to pass from the political scene, for the principles of 1789 and of 1848 are now triumphant everywhere, except in Russia, but then Russia is still in the eighteenth century. In the opinion of many, the future political battles in continental Europe will be fought between Socialism representing the laboring classes, and the allied conservative interests cemented by the Catholic church. In Belgium, particularly, has Liberalism been a vanishing cause which is, to some extent due to internal dissentions. In the first place, they are divided as to whether to stick to their "moderate" ideas or become radical; secondly, the racial question of Walloons versus Flemings has distracted the party; finally, they are always in doubt whether to throw in their lot with the Catholics or with the Socialists. Urged on by the Liberal Association, a radical organization, the Liberals in the last election formed a compact with the Socialists known as the "cartel," the aim of which was to fight the Catholics on the school issue. The "cartel" demanded compulsory secular education, the abolition of plural voting, and the "declericalization of the state."

In no land is Socialism less revolutionary, less romantic or so well harnessed to the ideal of peaceful slow change along coöperative lines as in Belgium. It is even afraid of labelling itself Socialist, and deliberately chooses to be known as the Labor party. It was born in the year 1885 and immediately began an agitation for universal suffrage. In 1894, after a tremendous demonstration, the Catholic government was forced to accede to their demand; in the election that followed, the Socialists won twenty-five out of one hundred sixty-six seats in the chamber of deputies. It is interesting to notice, how in spite of the dogma of internationalism which Socialists everywhere so loudly proclaim, the character of the Socialist movement in every country follows strictly along the line of national temperament. German socialists are as well organized and as well drilled as the German army; moreover,

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they are as full of abstract philosophy as any pedantic German professor. In France, Socialism smacks of the barricade, has the *élan* bequeathed by the French Revolution, is distracted by factionalism, and as meager of actual results as any bourgeois government that ever proclaimed a new republic in the name of "Liberty, Fraternity and Equality." In England, Socialism muddles along like the best of Tories and Liberals; it snatches a bit for itself here and there, is very careful not to have any principles and, of course, stands ready at all times to compromise. Now in Belgium, too, Socialism falls in harmony with the national temperament, which is communal. Belgium is alive with coöperative societies, some of the most important of which, are under Socialist auspices. One of the most remarkable places in Europe is "La Maison du Peuple" of Brussels. It would be hard to describe what it is not. In the first place, it is a great coöperative store supplying 20,000 families with every conceivable need: food, fuel, drink, furniture, drugs, etc. This vast department store does over 6,500,000 francs worth of business yearly. Besides, it is a great social center, wherein all sorts of clubs and classes hold meetings and give entertainments; medical attention is also furnished to members who form a sort of mutual benefit society. It is the nerve center of the Labor party and is known as the Socialist Vatican; there, strikes are called, policies determined upon and demonstrations organized. "La Maison du Peuple" publishes a daily paper, *Le Peuple*, which is the official organ of the party. At Ghent, there is a similar organization, known as the "Vooruit" which started as a small coöperative bakery and now does 3,000,000 francs worth of business annually. Along with groceries, bread and meat, the Socialist often retails ideas for these places are excellent means of propaganda and very often, a Belgian becomes a Socialist through nutrition. The coöperative societies are a new phase of the war waged against Capitalism by the laboring classes, who use these organizations to fight not only as producers but as consumers, by refusing to buy their things at stores run by private capital. This idea is spreading rapidly in Germany at the present time. Yet in spite of the distinctly national character of Belgian Socialism, it would be wrong to say that it has not been profoundly influenced by its neighbors. As the famous Socialist writer, Emile Vandevelde well says:

> Belgian Socialism, at the conflux of three great European civilizations, partakes of the character of each of them. From the English, it adopted self-help and free association, principally under the coöperative form; from the Germans, political tactics and fundamental doctrines

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. . . . from the French, it took its idealist tendencies, its integral conceptions of Socialism, considered as a continuation of the revolutionary philosophy.

The main issue of the exciting election that was decided on June 2 last was the schools. As the educational question has become an issue between Catholics and free-thinkers the world over, it may be of some interest to examine the situation in Belgium. In 1879, when the Liberals were in power, the government passed a stringent education law establishing a system of public schools on a free secular basis; later optional religious instruction was included. These were called the "neutral" schools because they were neutral in religion. The church bitterly denounced the "neutral" schools as Godless and anarchistic, and established a rival system, known as the "free" schools because they were free from government control. According to the law, the communes were compelled to maintain the "neutral" schools, though subsidies were granted by the central government. The tax was heavy and the Catholic father supported the "free" school besides. This was too much for the frugal Belgian. Moreover, the Catholics denounced the law as an interference on the part of the government with the rights of the communes, and so appealed to the historic communal spirit of the Belgians. In 1884 ,the Catholic party gained control of the government and immediatly passed a new education act, which is still in force. This law declares that every commune shall have the right to establish its own schools, and it may choose either the "neutral" or the "free." In case it chooses one or the other, the defeated party can then appeal to the central government. If a petition be signed by twenty heads of families, the school established by the minority in that district receives a small subsidy, provided it submits to government inspection. This law placed both school systems on a basis of equality for both, now had the right of public support. The Catholic government however studiously disregarded the interests of the public school and did all in its power to promote the welfare of its rival and enemy. As a result, secular education in Belgium during the thirty years that the law has been in existence, has suffered severely. Slowly but surely the public schools were being supplanted by those of the church. According to the latest statistics, 877 primary. 1079 adult and 228 orphan schools of the "neutral" system have been suppressed—likewise 14 state normal institutions. It is reckoned that 3316 public school teachers have had their salaries reduced and 1047 have been discharged, their places being taken by monks and nuns, who now constitute about one-third of all

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the teachers. Secular education was being slowly starved out of existence. In many places there are not enough "free" schools to take the place of those suppressed, and the rate of illiteracy is very high, about 18.6 per cent. Last year the Catholic party determined to make another attack on the "neutral" schools. The premier M. Schollaert, introduced a bill, the aim of which was to strengthen the "free" schools, and so give the church still greater control over Belgian education. Some of the features of this bill were very good: education was made compulsory, teachers were to get higher salaries and the elementary course was made two years longer. However, the main provision of the proposed law was the establishment of the *bon scolaire*, by which was meant that each year the communal authorities were to give every father in the district a certificate, known as the *bon scolaire*, for every one of his children of school age. The father was to have the right to send the child either to the "neutral" or to the "free" school. These certificates were to be collected by the head of the school to which the child went, and then turned over to the central government, which was to grant this school from 30 to 36 francs for each certificate. This meant, that not only had the Catholic schools the right to be supported by the local authorities, but, in addition they were to be given a large bonus from the central government. The Schollaert bill aroused a storm of indignation among Liberals and Socialists and as the Catholic majority in the last chamber was only six, the ministry resigned and the bill was withdrawn. M. de Brockville succeeded as prime minister, and it was understood that the bill would be re-introduced by him in case the Catholic party won in the following election. During the campaign, the Liberals and Socialists demanded compulsory education and a complete system of secular public schools under the control of the central government. The battle for the control of the child raged furiously; the issue was plain which side was to give the future citizen of Belgium, his lasting impressions.

Belgium has the peculiar distinction of having an electoral system which is at the same time the most and the least democratic in the world. Proportional representation, that democratic idea which is beginning to make progress everywhere, was first adopted in Belgium, where it is known as the "system of the common divisor" or the "d'Hondt method" from its inventor. The method provides for the division of the country into nine electoral units, corresponding to the nine provinces, and to each is assigned a number of deputies, according to population. These deputies are elected on a general ticket in the following manner. The ballot, as a rule, contains only three party columns, Catholic, Liberal,

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and Socialist, numbered 1, 2, and 3. In these columns are the lists of the candidates for the chamber of deputies, arranged in the order of choice by the party organizations. Every citizen is entitled to only one vote which he casts for the entire list by blackening the white spot at the top of the column; votes a straight ticket, as we say. He is not permitted to vote for more than one list on the ballot, and if he does so, the ballot is void; but if the order of the candidates, as arranged by his party, does not meet with his approval, he may show his disapproval by blackening the white spot in front of the name of the candidate he prefers. This means that he votes a straight ticket, but also gives a "preferential vote" for that particular man. It will be much easier to explain the operation of a Belgian election by giving an example. Let us say that in a certain province which is entitled to five representatives, 48,500 votes have been cast. Of this number, the Catholics have received 24,000; the Liberals, 15,000; the Socialists, 9000; the "electoral quotient" is obtained by successively dividing the vote of each party by 1, 2, 3, etc., thus:

	Catholic	*Liberal*	*Socialist*
Divide by 1	24,000	15,500	9,000
Divide by 2	12,000	7,750	4,500
Divide by 3	8,000	5,167	3,000

The five highest figures are then arranged in the order of size thus:

24,000
15,500
12,000
9,000
8,000

The figure 8000, being the highest for the fifth seat is declared the "electoral quotient." Dividing the Catholic vote 24,000 by the "electoral quotient" 8000, we get 3 and no remainder votes; the Liberal 15,000 by 8000, we get 1 and 7500 remainder votes; the Socialist 9000 by 8000 and we get 1 and 1000 remainder votes. Disregarding the remainder votes, the first three candidates on the Catholic list, the first one on the Liberal and the first one on the Socialist are declared elected. The problem of the "preferential votes" is solved in rather a complicated manner. Let us say that of the five names on the Catholic list, A, B, C, D, and E, candidate D got 4000 "preferential votes," the assignment will then be made viz: if D got 4000 "preferential votes," then 20,000 (24,000−4000) Catholic voters were satisfied with their party's arrange-

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ment of candidates on the list. This 20,000 forms a sort of pool, from which A and B each take out 8000, the amount of the "electoral quotient." This leaves 4000 for C which is not sufficient as the number is not equal to the "electoral quotient," but D has 4000 "preferential votes;" this with the remainder 4000 gives him 8000, equal to the "electoral quotient." Hence, A, B and D will be declared the winning candidates on the Catholic ticket. Proportional representation in Belgium has had the good effect of clarifying the political situation by forcing the adoption of a three-party system to correspond to the three classes of society. The leading men of each party are always certain of being elected to the chamber, for their names are generally put at the head of the list and this is tantamount to an election. In spite of the fact that the d'Hondt system was purposely designed to favor the largest party, representation in Belgium is fairly proportionate to the votes cast. Very rarely will the Catholic party have more than two or three deputies in excess of its rightful representation, according to the popular vote. Compare this with the frightful system of misrepresentation, fostered by the majority or plurality system, whereby huge minorities are practically disfranchised.

To counterbalance this democratic feature of the Belgium constitution, there was inaugurated a system of plural voting, based on property and education which strongly favors the conservative and aristocratic elements. According to the law, every Belgian citizen twenty-five years old, is entitled to one vote. He may get an additional vote if, at the age of thirty-five, he is a married man with children and pays at least five francs taxes on his dwelling; if in addition he owns real estate which nets him an income of at least forty-eight francs a year or has money invested which yields him an income of 100 francs annually he is entitled to another additional vote; two additional votes are granted to citizens who possess a diploma from a higher institution of learning or from a professional school. No citizen is allowed more than three votes. In the election of 1908, the number of electors was 1,697,619 of which 993,070 cast 1 vote, 395,886 cast 2 votes, 308,683 cast 3 votes. In other words, the last group, a small minority, had actually enough votes to nullify the will of the nation. A large number of the plural voters are the peasants, who generally own their farms, priests, officials and capitalists; the mass of workingmen, of course, have only one vote. On August 15, 1911, there took place a great demonstration in the streets of Brussels against the *"vote plural, vote rural, vote clérical"* which has become the campaign cry of the Socialists. After

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the bitterest campaign in the history of Belgium, the Catholics emerged unexpectedly triumphant. Of the 186 seats in the Chamber of Deputies they carried 101, a gain of 15; the Liberals, 45, which was the same as they had before; and the Socialists, 38, a gain of 4. The Christian Democrats, a progressive Catholic faction, elected two members. Of the popoular vote, the Catholics received 1,344,449, and the "cartel," 1,246,425, a Catholic majority of 103,024; the government majority over its allied opponents is now 18, whereas, in the last Chamber, it was only 6. Most significant is the fact that the Catholics made large gains in industrial centers like Brussels and Liège. The Socialists, too, increased their vote, though not as much as was expected; but the Liberals barely managed to hold their own.

This result was entirely unexpected, even in Belgium, and it calls for some explanation. In the first place, Belgium is prosperous and contented, and the electors are loath to oust from power the Catholic party that has governed so moderately, and on the whole, so successfully for thirty years. This feeling was naturally strongest among the property-owning classes, i. e., the plural voters, who really determine the electoral contests. Voting is compulsory in Belgium and this helps the conservative party. The well-to-do classes of continental Europe are notoriously lax in their civic duties, but the rapid growth of Socialism has aroused them to the danger that threatens them from below, with the result that, in some countries, laws have been passed making voting compulsory. This is intended as a prod to the conservative elements to be on guard. The Belgian law exacts a fine from those who fail to vote, greatly to the disgust of the Socialists, who, having a cause to fight for, seldom fail to make use of their franchises. The alliance of Liberals with the Socialists helped their opponents. Had the "cartel" won, there surely would have been several Socialists in the Liberal cabinet; it was well-known that the famous Socialist leader, Emile Vandervelde, was promised a portfolio. As in France, the entrance of Socialists in the cabinet meant the stiffening of the Liberal backbone to wage war on the church; in all probability there would have taken place the separation of church and state, the secularization of education and perhaps the confiscation of church property. The Belgian people are not ready for an anti-clerical crusade, for among them, the Catholic tradition is the strongest in Europe. Then again, the "petit bourgeois'" became badly frightened at the thought of the government being at the mercy of the Socialists. As in England and France, this would surely lead to a policy of still more radical social legislation which would mean increased taxes for him and he

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didn't at all relish the idea of being heavily taxed for the benefit of the workingman. Never very radical and exceedingly frugal, the Belgian middle classes, for this reason, deserted the Liberals in overwhelming numbers in favor of the Catholic party. This explains the large vote of the latter in the industrial centers; for it was the "independent" vote that made possible an overwhelming Catholic victory.

The most significant result of the Belgian election is undoubtedly the blow that has been dealt to secular education. During the campaign, the Catholics continually denounced the "neutral" schools as nurseries of crime and anarchy. Bonnot, the automobile bandit of Paris, whose desperate exploits had filled the columns of the sensational press, was held up as an example of the influence of the public schools on the rising generation. He was almost dignified into an issue. It must be remembered that the idea of public secular education is a new one in Europe, where primary schools have always been under ecclesiastical influence. At bottom, the middle classes in the old world are not very enthusiastic about popular education. They fear that an all-too-clever proletariat would made things uncomfortable for them, and the growth of Socialism has increased this fear. Religious, or at least, "moral" instruction, it is hoped, would modify those ideas and energies that make for revolution. Europe is as yet a little unwilling to follow the American example of allowing the common man to run the whole gamut of education, from the kindergarten through the university. The great ideal of America, its only original contribution to modern civilization, is not democratic government as is commonly supposed, but the public schools. Our people have a profound faith that only education, pure and simple, has the power to steady the workingman in his battle for a better existence in this world.

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JOURNALISM AND PUBLIC OPINION

BY ROLLO OGDEN

New York "Evening Post"

Any open-minded inquirer into the relations between the press and public opinion in this country will be met at the threshold by a series of paradoxes. The evidence offered him is sharply conflicting, even radically contradictory. Newspapers are all-powerful. They are also completely impotent. The press is at once dreaded and despised, dismissed as negligible at the same time that it is fawned upon. Men in public life will at one moment make every effort to get, in the French phrase, a "bonne presse," for themselves and their measures but at the next will rail at newspaper opposition as a thing at which they may snap their fingers. Their opinion of the futility of the press, it may be noted, is usually intensified, if not originally provoked, by their ceasing to stand high in its good graces.

Newspaper men, I pause here to remark, are willing to hear testimony showing the decline of their influence. But they may be excused for objecting when the only witnesses summoned are politicians with a grievance. Some editors have memories. Those who have not have records. And by either it would be easy to prove that some of the most vehement decriers of the newspaper press have been converted to their present view with suspicious suddenness. There is, for example, that public man who for many years was the most skilful user of the press that has ever been seen. It was not simply that he had an eye for effect keener than that of any advertiser in the world; but that he flattered and cultivated pressmen with the most unblushing assiduity. His attentions he showered upon all alike. Even the most indecent journalist of the age, who was for years, like Donne's Anchorite,

> Bedded and bathed in all his ordures,

this man had no scruple in receiving on personal and confidential terms. Latterly he has begun to cry out upon dishonest and decadent newspapers. Well and good. Let him lay on. But why did he wait to go against the press until the press went against him? The same question

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might be put to that city executive who now fills the air with complaints of a degenerate press, though no man more earnestly than he sought the support, and sung the praises, of the very newspapers he to-day denounces. The men of the press, I say, may well ask for witnesses with the taint of inconsistency not so gross and palpable upon them. Those in and out of journalism who have long sought to make head against its worst types, may be forgiven if they resent this late born zeal of recent converts.

Yet the unchallenged facts arrest attention. At times, it is true, newspapers appear to have a power both vast and dangerous. At others, they seem to have none at all. Now able to do anything, they presently are capable of nothing. There are classic instances. In the city of Toledo all the newspapers of all parties were hostile to a certain candidate for the mayoralty. They had fought him before, but he had beaten them. In the campaign referred to they decided upon the policy of ignoring him. They did not mention his name. They did not report his meetings or his speeches. They even refused to print political advertisements offered by him. But he was easily elected over this form of united opposition by suppression. There are other cases not unlike this. It has frequently happened in New York City that the press has been almost a unit against Tammany; yet Tammany has apparently shown that it could afford to despise the newspapers.

What have newspaper men to say to all this? First of all, they are not disposed to blink the facts. They know that it would do no good if they did. The influence of the press, whether good or bad, whether increasing or declining, is a theme of general discussion. Those in the business cannot be blind to this. They are aware of what is said. If outsiders are inclined to believe that the press has become "fortune's champion," merely "strong upon the stronger side," but powerless either to create or to direct public sentiment—much less to stem it—be sure that those on the inside do not shut these things from their thoughts. They can assume no airs of mystery. Their work is done in the general eye. It is fair game for the critics. Certainly the great clamorers for publicity cannot escape publicity. Nor do they seek to. As little as men in other callings are they fond of "talking shop" in public, but on fit occassion, like the present, they are ready to submit the whole question to impartial debate. And in their private or professional gatherings, let me add, they are as far as possible from swelling up in each other's presence with a pretence of inflated importance. If any of them were to be caught falling back upon comfortable plati-

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tudes about newspapers, or indulging in any of the solemn nonsense of Mr. Pott of the Eatanswill *Gazette* about the "enormous power of the press," he would be taken to task by some colleague, as that great man was by Mrs. Pott, and adjured to leave off making himself ridiculous.

In most discussions of the whole question, the test of the present-day rôle of the press in our public life is made the political test. The thing asserted or denied, that is to say, is the power of newspapers to make or break candidates for office, to carry elections. This is the region where the facts are most confused and the conclusions most dubious. There are no means of absolutely correct analysis. A given anti-Tammany campaign may seem to prove, by the rough logic of votes, that the press has no influence with the electorate. But who can say that, but for the persistent attitude of the newspapers, the Tammany victory at the polls might not have been much more sweeping? The press may have influenced many votes, only not enough. There is no way of telling accurately. The inquiry, however, is always pertinent at a time when the political effect of the press appears to be near the vanishing point. Moderate or negative achievement is not the same thing as impotence. But, whatever the just inference about all this, it is a mistaken narrowing of the subjet to restrict it to the political sphere. By politics alone neither man nor the daily press shall live. Campaigns are, after all, infrequent. Elections come but once a year—unless, indeed, one lives in Oregon or California, where they have come to be like daily bread. Even where the political animal is most highly developed, he has a wide range of intellectual and social interests having little or nothing to do with primaries or ballots or elections. Mr. Balfour, himself a politician, has said that nothing attempted or achieved by politicians or by political parties during the past hundred years is worthy to be named in significance for the human race alongside the mighty revolution quietly accomplished by modern science. There are, in fact, endless manifestations of the spirit of man and social movements of infinite complexity and importance, with which politics has nothing to do directly. Yet they enter more and more into the work of the press. It may be potent here even if it be conceded to have fallen away from its high estate in the matter of political influence, pure and simple.

I have just used a phrase implying that newspapers have lost power which they once had. But that is by no means certain. Great changes in the press there have undoubtedly been; its methods are not what they were; its influence, whatever it be, is exerted by means and modes

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of expression once undreamed of. But to affirm that the press in this country had a Golden Age from which there has since been a sad decline is, in my opinion, unwarranted. It is an assertion that will not bear the weight of a good history. People can always find decadence when they look for it. The Golden Age is invariably one generation back. And if we turn to one of the earliest intelligent discussions of the American press, and of its relations to public opinion, we shall find that seventy and eighty years ago the present complaints about the decline of newspapers were anticipated. I refer to De Tocqueville. His two chapters, with scattered incidental discussions, devoted to the place of journalism in the United States, have a queerly modern sound. He, too, discovered in that far-off happy time—happy because it is far off—that "the most intelligent Americans" were much concerned about "the little influence of the press." Doubtless they would have sadly shaken their heads and told the French visitor that they could remember when American journalism was much more dignified—the days of Freneau, for example!

De Tocqueville, however, made some philosophic observations of his own respecting our press, which are as sound now, in substance, as when he wrote them. Indeed, one in want of a guide to the understanding of the power and the limitations of our newspapers today, could not do better than take him. He declared, for example, that "the press cannot create human passions, however skilfully it may kindle them when they exist." There is a world of meaning in this. It is as true in 1912 as it was in 1831. And it applies not alone to the attempts of the press to play a great part in politics and to bring about changes in government, but as well to the whole range of intellectual interests and social concerns and the development of the humane spirit of our age, about which the press is more and more busying itself. Newspapers cannot create human passions. No, but the press can powerfully further them. Take the passion for human betterment. I have been told of a piece of advice which President Eliot is said to have given to a youth just graduating from college. He was an ardent young fellow, of good family and ample means, but filled with that sense of "social compunction" which Mrs. Ward has said to be the characteristic note of our day. He was anxious, that is, to do something for the improvement of social conditions; specifically, to help to correct certain social injustices, as he considered them, which had been impressed upon him in his own city. How to go about the work on which he had his heart? Mr. Eliot advised him to connect himself as a reporter with

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one of the local newspapers. In that capacity, he would be able, in a vivid and concrete way, to get before his public an account of the wrongs to be righted with suggestions of the way to right them. Without vouching for the truth of the story, I think that the moral of it is entirely sound, in so far as it points to the fact that social reformers find in the press today a powerful instrument ready to their hand. Through it they may, first, disseminate the facts, often in a moving fashion; then bring about a common sentiment respecting some surviving form of human oppression, some persistent industrial or social wrong; and finally transmute that feeling into systematic agitation and an organized movement for reform by law.

All this, to go back to De Tocqueville, was clearly perceived by him. What I have been saying is but an illustration of his remark: "When many organs of the press adopt the same line of conduct, their influence, in the long run, becomes irresistible; and public opinion, powerfully assailed from the same side, eventually yields to the attack." That was true in the middle of the nineteenth century and it is true to-day. The press may not greatly initiate but it wonderfully reverberates. In its franker moments it has humbly to confess itself, with Lowell, "child of an age that lectures, not creates;" but given the origination of an idea or an agitation, it can contribute mightily to its acceptance by the reading public. Here comes in its power of iteration —"damnable," if you please, in many instances, but none the less effective. The organization of news in this country yields a result nowhere else known. By means of the Associated Press, and other news-gathering agencies, it often comes about that all our millions of population are reading the same thing on the same day. This implies both an audience and a unified power of impressing it without a parallel in other lands. And no one denies that the opportunity is availed of. For good or bad, the newspaper-reading habit of Americans, combined with this ability to present virtually identical matter in every section of the republic, is a vital element in the formation of public opinion. Instance after instance could be given of the continual dropping which wears away the stone. It is, no doubt, true that newspapers "cannot form those great currents of opinion which sweep away the strongest dikes," but they do offer themselves as ready channels for the flowing of such currents, once they get started in the thought and feeling of the people.

This may be a humbler function than is customarily attributed to the press, or claimed by it, but few will dispute that it is a useful one,

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or may be made so. The methods or devices employed to exert even this kind of influence are much in controversy, both in and out of the profession—if profession it may be called. It is frequently said that newspaper editorials are no longer of any account. An editorial writer could hardly be expected to maintain the contrary. The chief emphasis is laid upon the news columns, more or less colored by the policy or the bias of the particular paper, upon the cartoons, above all upon the headlines. About the last, especially, there is much complaint. Not all of it is without justification. The headline often covereth a multitude of sins. Politicians and others attacked by the newspapers are heard bitterly to say that if they could write the headlines they would not care what appeared in the rest of the paper. That an abuse lies in this, sometimes grievous abuse, no honest newspaper man would deny.

But it should not escape notice that those who rail at the press for seeking to mislead the public by capital letters and staring colored type are indicting, not only the press, but the general intelligence. If readers suffer themselves to be fooled by captions, without waiting to see whether they are borne out by the contents, what is this but one proof more that the faculty of sustained attention is disappearing? If we nowadays peruse serious books only by titles and chapter headings, and take our art merely by glances at facile reproductions, what wonder if we read newspapers on the run, and let the eye dwell upon little that is not at the top of the page?

Here is suggested the important consideration that there is something reciprocal in the relations of the press to the public. Newspapers, like party leaders, get from their constituents, as well as give to them. In either case it is a nice question whether they do not get more than they give. The press cannot be studied or fairly judged apart from its environment. It is, with all our institutions, caught in the complex of our actual state of civilization. And the whole question of bringing about reforms in newspaper methods—Heavens know that they are needed—must be discussed from both sides. Editors have their responsibility, and in some cases the responsibility for what they do is fearful; but the public is also responsible. The community always holds the power of life or death over newspapers. No form of property is more precarious. The most offensive and hurtful types of newspaper could not live a year if the public issued a really determined decree that they should die. I cannot here discuss the duty of newspaper proprietors and editors, in regard to the admitted evils of the press in our

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day. But the chief duty of the public is to discriminate among newspapers. Towards the vulgar and vicious it should manifest not only disgust but an active and unflagging hostility. The location of the Garden of Eden is still in dispute; but if it ever is determined and the tree of the knowledge of good and evil discovered, a cutting from it should be taken and planted near every news-stand in America.

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THE PRESS AND PUBLIC OPINION

Abstract

BY TALCOTT WILLIAMS

Columbia University

A man reading a political editorial is usually in the minds of men who set out to discuss the relation between "The Press and Public Opinion." "Does it convince him," they ask. The issue is broader, as broad as the consciousness of society. Without a common consciousness in regard to the fact and event of the day, shared by individuals, but known together and at once, public opinion, in the modern sense, could not exist. The opinion and action of modern society in all its various forms and channels rests on the possession by the individuals who make up society of a common body of knowledge and fact supplied day by day in the newspaper. If the individuals who make up the social organism did not have this common daily knowledge of a common body of fact which each knows is in common, they could not feel, think or act together any more than the individual can have conscious feeling, thought and action without the light of consciousness to enable him to act. This common consciousness of society the newspaper creates. The street and market-place do something, the public meeting does more, the book, weekly and monthly, go a step farther to bring people to think the same things about the republic, and on all the issues of society, but the daily newspaper does more than all the rest put together. The reason why the news in a newspaper counts is not because news is recorded there. All news, social, political, criminal, has other records. Newspaper news is news and not daily annals, because it is read by great masses. Every reader knows that all other readers are in the same light of facts, chronicled with more or less accuracy it may be, but still read by all and known by all. In the light of this common consciousness, common opinion develops and the relation of the opinion-making part of a newspaper, the editorial, to the making of opinion rests on the fact that it enters on the field of common public consciousness at the very moment that event and issue are calling for opinions, decision and action. The editorial is perpetually weighed and estimated as if it were something said by one man to

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another man or the page of a book read by successive readers, when its real weight lies in the vast mass who for an instant read it when the news is before them and they are aware that their attention is the conscious attention of all the readers of which they are a part. What was individual when written, becomes representative when and because it is circulated. Each newspaper, by a mingling of business acumen in selling its daily issue, by presenting out of the daily welter of news a definite share, and lastly by its opinions on this news gathers a circulation for whose existence it is responsible, and for which it speaks in a representative capacity, restraining individual utterance by the consciousness of this representative responsibility. Those who reach the narrower audience of book, lecture, article and mass-meeting never understand and probably never can understand this sense of responsibility for the audience of readers to whom and for whom, the newspaper speaks. If the readers did not want what it said, the circulation would cease, and, if the circulation ceased, the newspaper would become a daily pamphlet, as indeed some newspapers addressing a small special group of cultivated readers are and remain. The share of the newspaper in making public opinion is therefore radically different from that of the speaker, the scholar or the author. They express themselves and find in the newspaper, the periodical and the book the field in which they are individually heard. The newspaper expresses its audience. Its province is essentially fiduciary. Its daily record creates the consciousness in which its opinion both awakes and mirrors the opinion of its readers. With every newspaper receiving five or six times as much news as it can daily print, the selection of that share of the news which will be read,—and unless read, it is printed in vain,—makes technical selection of increasing importance and increasing difficulty, calling for more and more technical training. The editorial, once the vehicle of political opinion, has widened to the expression of public emotion, of explanation and instruction, of elucidation, of adding to the knowledge of the average the special information of the expert on the news of the day. There all the news, political discussion, and all the various forms of instruction on the editorial page in financial articles, correspondence and in all the opinion-making share of a newspaper not only express but reflect that audience of readers which gives a newspaper its power. The American newspaper as a whole is reproached with representing too much the business, the capital and the associated wealth of the land. The American newspaper is published in a country, 8,500,000 of whose families, full half each taking its paper, own realty. There are at least 5,000,000 men,

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each a reader, interested personally in 1,500,000 firms in operation of whom less than 1 in 3000 or about 500 in 1,500,000 do a business, large in the modern view. There are 1,000,000 to 2,000,000 owners of shares and bonds. There are 7,000,000 life insurance policies with an average of $1700 each, representing 3,500,000 of the insured one to every six families in the country. This great army of property-owners holds the ablest, the most vigorous, the most thrifty, the dominant and the larger half of American life. Whom should the American newspaper represent but this property-owning business majority, which every man or woman of thrift, industry and initiative can join at will.

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